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NO. 50718-8-II

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

WASHINGTON COALITION FOR OPEN GOVERNMENT,
a Washington Nonprofit corporation

Appellant,

v.

PIERCE COUNTY

Respondent.

BRIEF OF RESPONDENT PIERCE COUNTY

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E.	Unpublished Decision: *Northup v. Dep't. of Corrections*, 2015 Wash. App. LEXIS 1432 (July 6, 2015).
F.	Engrossed House Bill 1595.
G.	Unpublished Decision: *Chen v. City of Medina*, 2014 Wash. App. LEXIS 343 (Feb. 10, 2014).
H.	Decision Published in Part: *Kittitas County v. Allphin*, 195 Wn. App. 355, 381 P.3d 1202 (2016), review accepted, 187 Wn.2d 1001, 386 P.3d 1089 (2017).

I. INTRODUCTION

This is an appeal from the dismissal of a suit arising out of a Public Records Act ("PRA") request made by counsel for Appellant, the Washington Coalition for Open Government ("WCOG"), to Respondent Pierce County ("the County"). The request sought County litigation records from *Nissen v. Pierce County*, a separate PRA lawsuit which advanced from the Superior Court, to the Court of Appeals, to the Supreme Court, and then back to Superior Court on remand.[1] The request called for a large volume of records from the case, many of which would obviously contain attorney work product and privileged information.

During the course of the County's rolling production of installments and long before its response to the request was completed,[2] Appellant's counsel brought suit against the County on behalf of WCOG. The Superior Court did not completely dismiss the suit as premature under *Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 335 P.3d 1004 (2014), as requested by the County, but it declined to address any agency actions that occurred after the initiation of the suit. Ultimately, the court dismissed on the merits those claims it held were properly before it and ripe for consideration. It correctly held the County did not violate the

[1] *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

[2] Due to the volume of records responsive to the request and the amount of review and redaction of exempt privileged attorney-client and work product, the County still continues its response to Appellant's counsel in installments.

PRA when it sent some installments of records to the requester by mail rather than electronically, when it sent one installment of records in paper format rather than as a PDF electronic file, when it asserted certain litigation records from *Nissen* were exempt based on attorney-client privilege and work product, or when it described those records in its exemption logs. This Court should affirm the trial court's dismissal of the case on the merits. Alternatively, the court should hold that WCOG's suit was improperly commenced prior to the completion of the County's response to its voluminous request and should have been dismissed in its entirety as premature.

II. COUNTER-STATEMENT OF ISSUES

A. Was WCOG's suit under the PRA subject to dismissal as premature, either in part or in its entirety, where it is undisputed that the County was (and still is) continuing to provide records responsive to its expansive request on an installment basis?

B. Where the County has produced thousands of records in response to a PRA request that seeks a large volume of documents and the requester initiates suit before the County's response is completed, must the plaintiff-requester identify which disputed records it is asking the court to rule upon?

C. Did the trial court correctly hold that the County did not violate the PRA by (1) sending some installments of records to the requester by U.S. mail rather than by e-mail or electronically or (2) sending one installment of records in paper format rather than as a PDF file?

D. Did the trial court correctly hold that the County did not waive attorney-client or work product privilege by sharing documents

with Lindquist and/or the amicus parties who supported the County's position in the *Nissen* case, because these parties all had a common interest relationship in that litigation?

E. Did the trial court correctly hold that the County's exemption logs asserting that records were protected by attorney-client and work product privileges under the controversy exemption were adequate where the logs provided both identifying information about the records and an explanation of how the exemptions applied to the records?

III. COUNTER-STATEMENT OF THE CASE

A. Background Regarding *Nissen v. Pierce County* Litigation

In 2011, Glenda Nissen made a PRA request to the County for records from Prosecuting Attorney Mark Lindquist's personal cell phone, and she ultimately brought a PRA action that advanced from Superior Court, to the Court of Appeals, and ultimately to the Washington Supreme Court. The PRA requests at issue in *Nissen* sought not merely work-related e-mails on Prosecutor Lindquist's cell phone, but <u>all</u> records on the phone from particular dates, without any limitation. *Nissen,* 183 Wn.2d at 869-70; CP 37-38. Prosecuting Attorney Lindquist obtained the records in his possession and provided them to the County, which in turn reviewed them and provided them in partially redacted form to Nissen. *Nissen*, 183 Wn.2d at 870; CP 203-06. As described by the Supreme Court in its opinion:

> Dissatisfied with the County's disclosures, Nissen sued the County in Thurston County Superior Court. She sought an *in camera* review of Lindquist's text messages and the call

> and text message logs to determine if all of the information is a public record. Lindquist intervened and moved for a temporary restraining order and preliminary injunction to enjoin further disclosure of records related to his cell phone. He argued that compelling him to disclose his text messages would violate the state and federal constitutions and was prohibited by state and federal statutes. That same day, the County moved to dismiss Nissen's complaint under CR 12 (b)(6). It argued the records at issue could not be public records as a matter of law, because they related to a personal cell phone rather than a county-issued one.

Nissen, 183 Wn.2d at 871. The County was the defendant agency in this PRA lawsuit, but Prosecuting Attorney Lindquist also retained his own attorney, Stew Estes, to intervene for purposes of safeguarding his own privacy interests in his personal cell phone records. CP 42-44. The County and Lindquist took identical positions in the *Nissen* litigation: both argued that the records at issue were not public records under the PRA and that requiring their disclosure would result in a violation of the constitutional rights of public employees. CP 46-102.

In the Court of Appeals and the Supreme Court, several organizations filed *amicus curae* briefs supporting the County's and Lindquist's position. These organizations included the Washington Association of Prosecuting Attorneys ("WAPA"), the Washington Association of Municipal Attorneys ("WSAMA"), and several labor organizations whose constituents are public employees ("Public Employees"). CP 103-194. To obtain permission from the appellate

courts to file this briefing, each of these organizations filed motions specifically describing their interests in the *Nissen* case. *Id.* These organizations' motions and their subsequent briefing made clear that they were aligned with the County's position in the case insofar as the privacy interests of their constituents would be implicated by the court's decision. *Id.*; CP 1829-31.

Ultimately, the Washington Supreme Court held that most of the records at issue, such as call logs, were not public records. *Nissen*, 183 Wn.2d at 882-83. It held that transcripts of the content of text messages were potentially public records if they were work-related. *Id.* at 883. On remand, it directed Prosecuting Attorney Lindquist to perform a search of records and prepare an affidavit with sufficient information to allow a court to determine that any records withheld are not public records. *Id.* at 886-87. After conducting an *in camera* review, the trial court held that a single text message written by Prosecuting Attorney Lindquist was a public record responsive to the request. CP 195-202. At the time of the County's receipt of the PRA request, however, this text was no longer on Prosecuting Attorney Lindquist's cell phone, and the County had believed based on information from the cell phone carrier, Verizon, that it no longer existed. CP 203-06.

B. The PRA Request at Issue in This Case

On April 1, 2015, Appellant's counsel herein, William Crittenden, sent a PRA request by e-mail to Pierce County Deputy Prosecuting Attorney Dan Hamilton. CP 458, 469-72. Mr. Crittenden's request sought records from the County relating to the *Nissen* case as follows:

> (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.

CP 470. Mr. Hamilton is not a public records officer, but he forwarded the request to the public records officer for the Pierce County Prosecuting Attorney's Office, Joyce Glass. CP 458. On April 8, 2015, Ms. Glass sent Mr. Crittenden a letter with the County's initial response, giving an

estimate of four (4) weeks for when the County's first installment would be ready. CP 458, 475-76.

On April 17, 2015, Mr. Crittenden sent Ms. Glass a letter objecting to the fact that she was corresponding with him by regular mail instead of by e-mail. CP 477-78. On April 19, 2015, Mr. Crittenden sent an expanded request, again by e-mail to Mr. Hamilton, which added the following to his earlier request:

> (e) All records, including correspondence, email, notes, drafts and word processing files, relating in any way to the amicus briefs filed by the Pierce County Prosecuting Attorney's Association in the Glenda *Nissen v. Pierce County* litigation.

CP 458, 479-81.

On May 11, 2015, Ms. Glass sent Mr. Crittenden a letter notifying him that the first installment of the County's response to his request, consisting of 533 pages, was ready. CP 458-59, 490-92. On May 14, 2015, Mr. Crittenden sent Ms. Glass an e-mail objecting to her response for a number of reasons. CP 493-94. On July 1, 2015 Mr. Crittenden sent another e-mail stating that he was sending a check for the first installment of records "under protest", because he had asked that the records be provided as a PDF rather than on paper. CP 495-97. The County received the check on July 6, 2015, and on July 9, 2015 Ms. Glass sent Mr. Crittenden the seventy-two (72) pages from the first request that were

not completely redacted based on work product and returned his check for the first installment. CP 459, 498-99. In doing so, she was attempting to respond to Mr. Crittenden's complaint in a prior e-mail that he did not wish to pay for records that had been completely redacted due to privilege. *Id.* Ms. Glass also estimated that the second installment would be ready within four (4) weeks. CP 498-99.

On July 15, 2015, Mr. Crittenden sent an e-mail stating that he still wished to receive the other 461 blackened pages from the first installment, and thus he sent another check for all pages in the first installment, which was received by the County on July 20, 2015. CP 459, 500-01. On August 10, 2015, Ms. Glass sent Mr. Crittenden a complete set of records from the County's first installment (including the records that were completely blackened-out due to privilege) and also advised him that the second installment, consisting of 233 pages, was ready. CP 460, 502-05.

On August 28, 2015, Ms. Glass retired from the County and her e-mail account became inactive. CP 460-61. At that time, Theresa Brown took over Ms. Glass' position as public records officer for the Pierce County Prosecuting Attorney's Office. CP 460. On October 19, 2015, Mr. Crittenden wrote an e-mail to Mr. Hamilton complaining that "there is something wrong with your e-mail system." CP 460-61, 511-14. Mr. Crittenden had sent an e-mail on August 31, 2015 to Ms. Glass. CP 460-

61, 511-14. Ms. Glass did not receive the e-mail due to her retirement and the deactivation of her e-mail account. CP 460-61.

Upon being alerted to Ms. Glass's retirement, Mr. Crittenden forwarded the August 31, 2015 e-mail to Ms. Brown. CP 460-61, 515-17. On October 23, 2015, Ms. Brown advised Mr. Crittenden that the County would give him the option of having the remaining installments sent on CD rather than in paper copy format if he would pay $0.84 per minute for scanning plus the cost of materials and postage. CP 461, 528-33. On November 19, 2015, Mr. Crittenden e-mailed Ms. Brown a letter purporting to reject this offer. CP 61, 534-35. On December 2, 2015, Ms. Brown again wrote to him again offering to send the second installment in either paper format or on CD as PDF files. CP 461, 536-38. Despite his earlier rejection of the offer to pay for responsive records to be scanned, on December 7, 2015 Mr. Crittenden sent a check to the County to obtain the installment scanned onto a CD. CP 461-62, 544-45. The County sent Mr. Crittenden a CD containing the second installment on December 14, 2015. CP 461. Despite the fact the County was still in the process of responding to his request, Mr. Crittenden commenced this suit on behalf of WCOG that same day by serving the County Auditor with the Summons and Complaint. CP 1047, 1051-61.

The County has continued to respond to Mr. Crittenden's request since this suit was filed with regular installments. Between December of 2015 and March of 2016, the County produced second through fifth installments, each of which was provided in PDF format on a CD sent by U.S. mail. CP 436-37, 440-42. In May of 2016, the Prosecuting Attorney's Office approved use of a system called Filelocker for producing records in electronic format via internet download. CP 436-37, 443-44. The sixth installment, produced on May 13, 2016, was made available by internet download with Filelocker. CP 436-37, 440-42. While other departments of the County had used Filelocker before, this production was the first time the Prosecuting Attorney's Office had used the system.[3] CP 436-37. All subsequent installments to the request have been produced using Filelocker. *Id.* To date, thousands of pages have been produced in regular installments, and the County's production of records is continuing. CP 434-35, 440-42.

C. Procedural History of This Lawsuit

WCOG commenced suit against the County by serving the Summons and Complaint on December 14, 2015.[4] At an initial scheduling conference on April 29, 2016, the parties informed the court

[3] There is no centralized public records office for Pierce County as a whole, and each of the County's individual departments has its own public records officer. CP 464.

[4] WCOG delayed filing the Complaint in Thurston County Superior Court until March 10, 2016.

that they would be filing cross summary judgment motions seeking a ruling whether the suit was premature under *Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 335 P.3d 1004 (2014). 04/29/16 RP at 5. The court welcomed the parties to schedule this hearing but stated its overall view of *Hobbs* beforehand:

> So let me give you my general view of how it works with *Hobbs* and the issues the parties are presenting. At some point, the issues are closed, and in my view generally that's when the complaint is filed. So, in other words, a party can say, "untimely response, no response, please order the parties to submit a response, I'm complaining about the response or about the claimed exemptions," and that's what the Court does, then orders a response.
>
> I am not inclined to agree, especially as we are starting this litigation, that the Court will have continuing jurisdiction to hear anything that occurs in months and years to come about this response. So there may be other litigation, but in terms of this litigation, it's getting a response, if you think the response is delayed.

04/29/16 RP at 7.

On June 17, 2016, the trial court heard the parties' cross summary judgment motions. CP 1013-25, 2047-64. It held that at least one theory of PRA liability asserted by WCOG was not precluded by *Hobbs*, but it also held the issue could be revisited:

> [T]his Court is denying the motion to dismiss the case in its entirety based upon the *Hobbs* case. The Court believes it is necessary to address whether one or more arguments of the plaintiff is a denial of records. That includes the argument that records were not provided in a method

> chosen solely by the requestor. The Court does not believe that *Hobbs* prevents it from addressing that question.
>
> . . . I do want to make clear, however, that in denying the motion of the County and in granting the motion essentially finding that plaintiff's claims are not premature, I want the parties to understand that the Court may find in the future that certain claims are premature, because I believe that those need to be broken down by claims, and I think I have indicated that in my ruling. So I want that to be clear.

06/17/16 RP at 40 – 44; *see also* CP 930-31.

Over the next several months, the trial court twice granted motions for protective order filed by the County with respect to discovery requests WCOG propounded and depositions it noted. CP 1560-62, 1825-28. The County answered the majority of WCOG's interrogatories and requests for production, but it objected to certain discovery requests that were simply designed to harass and it opposed WCOG's efforts to take depositions of the County's elected Prosecuting Attorney and other attorneys of record from the *Nissen* case. CP 8-23, 1546-59. The court ruled WCOG could raise the need for additional discovery during the course of the hearing addressing the merits of the case. CP 1827.

During a pre-hearing scheduling conference on January 13, 2017, the court stated it was setting a single merits hearing "regarding any issues that the parties wish to have heard . . ." 01/13/17 RP at 33 (emphasis added). The court entered an order scheduling the hearing for April 21,

2017 and establishing a timetable for the submission of briefing and materials by the parties. CP 2065.

WCOG submitted 121 exhibits for consideration at the hearing. CP 2122-2980.[5] Only a handful of the exhibits were actually records produced by the County in response to the PRA request at issue. *Id.* The other exhibits were comprised largely of immaterial documents that were hearsay, including newspaper articles,[6] complaints about unrelated personnel issues,[7] records from unrelated cases,[8] and statements by attorneys that Prosecuting Attorney Lindquist had a conflict of interest in *Nissen*.[9] The County lodged objections to the majority of WCOG's exhibits as either irrelevant, hearsay, or both. CP 1528. The County also objected to the attorney statements as inadmissible opinions on issues of law that are exclusively within the province of the court. CP 1527.

WCOG did not point out either in its hearing brief or in its oral argument which specific records it was asserting were improperly claimed as exempt. CP 2013-21. WCOG insisted that it did not even have the minimal burden, as the plaintiff, of identifying which specific records it

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[5] WCOG's exhibits were filed after the hearing as attachments to a declaration by WCOG's counsel, and they therefore appear in the appellate record of this matter as Clerk's Papers rather than Exhibits.

[6] CP 2579-83, 2592-95.

[7] CP 2126-41, 2327-54, 2369-2435, 2601-05.

[8] CP 2959-65.

[9] CP 2356-68.

was asking the court to rule upon, instead stating that simply providing "examples that highlight why the exemption claims were wrong" satisfied any burden it had. 04/21/17 RP at 8-9, 55. These examples, according to WCOG, showed that the County was improperly claiming as exempt records that had been shared between the County, Lindquist, WAPA, WSAMA, and Public Employees in the *Nissen* litigation. *Id.* WCOG also argued that the County's exemption logs were inadequate, because they did not provide detailed information about the common interest relationship between these parties in *Nissen*. CP 2019.

WCOG did not brief any request for injunctive relief for the County to adopt additional rules. CP 2013-21. However, it claimed that the County should be held liable under RCW 42.56.100, the provision of the PRA requiring agencies to adopt "reasonable rules and regulations." This claim by WCOG was based on the County's production of one installment of records on paper rather than electronically and its transmittal of some installments by U.S. mail rather than by e-mail or internet file transfer. CP 2019-20. WCOG characterized this claim as being based on the County's failure to provide the "fullest assistance" to the requester. *Id.*

The County renewed its argument that WCOG's suit was premature under *Hobbs*. CP1533, 1542. The County argued that although

it had the burden of establishing that an exemption applied to disputed records, WCOG had the initial burden, as the plaintiff, of identifying which records it was asking the court to rule upon.[10] CP 1534. To the extent that WCOG was making a general claim that the attorney-client or work product privilege was waived by the County based upon sharing documents related to *Nissen* with Lindquist, WAPA, WSAMA, and Public Employees, the County argued that no waiver occurred due to the common interest relationship of these parties. CP1534-36. The County further argued its detailed exemption logs were adequate. CP 1542-44.

On June 15, 2017, the trial court issued a letter ruling in the County's favor. CP 423-28. The trial court held that the attorney opinions submitted by WCOG regarding an alleged conflict of interest were inadmissible as a matter of law. CP 425. Although the court did not strike other exhibits submitted by WCOG to which the County objected, it noted that it considered them "in light of admissibility standards" under the Rules of Evidence. *Id.*

In response to the County's renewed argument under *Hobbs*, the court did not completely dismiss WCOG's claims as premature, but it ruled – consistent with its earlier statements regarding its view of the *Hobbs* case – that it was "<u>not addressing any agency action or decisions</u>

[10] By the time of the hearing, the County had produced thirteen installments of records totaling over 9,000 pages. CP 435.

made regarding installments produced after the initiation of this litigation." CP 426 (emphasis added). At the time that the Summons and Complaint were served on the County in December 2015, the County had provided WCOG with only the first two installments of records, which consisted of the first 766 pages.[11] Almost all the records contained in WCOG's exhibits at the hearing were from installments the County had produced well after that time.

The trial court held the County did not waive attorney-client or work product privilege when it shared documents with Lindquist, WAPA, WSAMA, and Public Employees in the *Nissen* litigation. CP 426-27. In response to WCOG's claim that it could bring a PRA claim based on the violation of an alleged duty to adopt rules, the trial court concluded there was no authority holding that the PRA is violated based on an agency's failure to adopt rules allowing electronic transmittal of records. CP 426.

Additionally, the trial court held that the County's exemption logs were adequate. CP 427-28. It reasoned that because the common interest doctrine is merely an exception to waiver and not an independent basis for withholding or redacting records in response to a PRA request, it need not

[11] For the court's convenience, **Appendix A** to this brief is Ms. Brown's February 21, 2017 letter to Mr. Crittenden, which provides dates of production of the County's first thirteen installments of records together with the numeric page range for each of those installments. CP 441-42.

be specifically identified in exemption logs.[12] *Id.* Rather, it held, citing either attorney/client privilege or work product was sufficient, because "[t]he common interest doctrine is part of the attorney-client privilege and the work product privilege." CP 428.

On July 18, 2017, the trial court reduced its decision to an order of dismissal with prejudice. CP 354-60.[13] WCOG filed its notice of appeal on August 11, 2017. CP 362-69.

IV. ARGUMENT

A. Standards of Review

The standard of review of agency actions in PRA cases is *de novo*. RCW 42.56.550(3). Where the record consists only of affidavits, memoranda of law, and other documentary evidence, the appellate court stands in the same position as the superior court and is not bound by the superior court's factual findings on disputed facts. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 252-53, 884 P.2d 592 (1994). The appellate court may affirm the trial court on any ground supported by the record. *Francis v. Dept. of Corrections*, 178 Wn. App. 42, 63, 313 P.3d 457 (2013).

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[12] In fact, some of the County's exemption log entries did specifically invoke the common interest doctrine. *See, e.g.*, CP 576.

[13] A copy of the order of dismissal, which contains the trial court's written decision, is attached to this brief as **Appendix B.**

The County is unaware of any authority specifically addressing the proper standard of review for evidentiary rulings made by a trial court in conjunction with a PRA hearing. In most contexts, the standard of review for evidentiary rulings is abuse of discretion. *See, e.g., City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). However, evidentiary rulings made by a trial court in the course of a summary judgment proceeding – which the County submits is most analogous to a PRA proceeding in which all of the evidence is submitted by affidavit or declaration in lieu of live testimony – is *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663-64, 958 P.2d 301 (1998).

B. Most of the Evidence WCOG Relies Upon is Inadmissible

As a preliminary matter, this court should scrutinize the record to determine whether many of WCOG's factual assertions are properly supported. While the trial court did not expressly rule on the admissibility of each of WCOG's exhibits to which the County objected, it only considered documents to the extent permitted by the Rules of Evidence. CP 425. Further, WCOG does not challenge the trial court's ruling that the attorney statements it relied upon were inadmissible.[14] CP 425. Yet,

[14] Expert opinion testimony regarding an alleged conflict of interest is inadmissible. *See, e.g., State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012)(whether a conflict of interest exists requiring disqualification of an attorney is an issue of law); ER 104(a) (existence of privilege is issue of law for the court). An expert is permitted to express an opinion only if it "will assist the trier of fact to understand the evidence or to

in its Opening Brief WCOG continues to rely upon and cite to these same inadmissible documents.[15] The County reasserts the objections to admissibility it raised in the trial court in this appeal. CP 1527-28. This Court should decline WCOG's invitation to rely upon hearsay and documents that are completely irrelevant to the issues at hand.

C. WCOG Prematurely Commenced This Suit Before the County's Response to Its PRA Request Was Completed

RCW 42.56.550 is the provision of the PRA that establishes a right to relief for requesters in superior court. "The PRA provides a cause of action for two types of violations: (1) when an agency wrongfully denies an opportunity to inspect or copy a public record or (2) when an agency has not made a reasonable estimate of the time required to respond to the request." *Andrews v. Washington State Patrol*, 183 Wn. App. 644, 651, 334 P.3d 94 (2014) (citing RCW 42.56.550(1), (2)). In this case, WCOG conceded that it was not bringing a claim against the County based on the

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determine a fact in issue." ER 702 (emphasis added). Thus, it is well settled that "[o]pinion testimony on legal issues is not admissible." *Bell v. State*, 147 Wn.2d 166, 179, 52 P.3d 503 (2002). Witnesses may not express legal conclusions under the guise of expert opinions. *Terrell C. v. State*, 120 Wn. App. 20, 84 P.3d 899 (2004); *see also Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993); *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985); *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003). The same rule prohibits experts from expressing opinions of mixed fact and law. *See, e.g., Hiskey v. Seattle*, 44 Wn. App. 110, 113, 720 P.2d 867 (1986) (citing Comment, ER 704; *Orion Corp.*, 103 Wn.2d at 461).

[15] *See, e.g.*, WCOG's Opening Brief, pp. 11, 37-38.

County failing to provide a reasonable time estimate.[16] Thus, all of WCOG's claims are brought under RCW 42.56.550(1).

In cases brought under RCW 42.56.550(1), a requester "having been denied an opportunity to inspect or copy a public record by an agency" is authorized to bring suit. *Id.* In *Hobbs*, this Court held that a PRA action commenced by a requester prior to the agency's completion of its response was barred under the statute's plain language:

> . . .Hobbs takes the position that a requester is permitted to initiate a lawsuit prior to an agency's denial and closure of a public records request. The PRA allows no such thing. Under the PRA, a requester may only initiate a lawsuit to compel compliance with the PRA after the agency has engaged in some final action denying access to a record.
>
> Under RCW 42.56.550(1), the superior court may hear a motion to show cause when a person has "been denied an opportunity to inspect or copy a public record by an agency." Therefore, being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, we conclude that a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.

Hobbs, 183 Wn. App. at 935-36. The Court found that this conclusion was further supported by the language of RCW 42.56.520: "The language in RCW 42.56.520 itself refers to 'final agency action or final action.'

[16] At the summary judgment hearing WCOG's counsel stated, "We have not brought a claim for an estimated time of response, and that is our decision not to bring that claim." 06/17/16 RP at 9-10.

Thus, based on the plain language of the PRA, we hold that before a requester initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Id.* (quoting RCW 42.56.520).

Additionally, *Hobbs* rejected the claim that "an agency is categorically precluded from voluntarily curing alleged PRA violations while they are [sic] making reasonable efforts to fully respond to the public records request." *Id.* at 939. Reviewing prior case law, this Court recognized that agencies should be able to correct alleged deficiencies to public records requests while they are still responding and before final agency action has been taken. *Id.* at 937-39. In unpublished decisions, both Divisions I and II of the Court of Appeals have re-affirmed the rule stated in *Hobbs*.[17]

WCOG's reliance below on Division I's decision in *Cedar Grove Compost, Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 246 (2015), to argue that *Hobbs* does not apply to this case was misplaced. There, the requester made a PRA request to the City on November 2,

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[17] *West v. Bacon*, 2017 Wash. App. LEXIS 2880, 2017 WL 6492709 (Dec. 19, 2017); *West v. Port of Tacoma*, 2017 Wash. App. LEXIS 1473, 2017 WL 2645 (June 20, 2017); *Northup v. Dept. of Corrections*, 2015 Wash App. LEXIS 1432 (July 6, 2015). "[U]npublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1 (a). Copies of the above unpublished decisions are attached as **Appendices C, D, and E.**

2011, and the City responded in several installments. *Id.* at 703-05. In a February 2, 2012 installment the City initially redacted e-mails between the City and one of its contractors based on an improper assertion of attorney-client privilege. *Id.* at 704. In June 2012, the requester inquired whether the City had inadvertently redacted these documents, but the City re-affirmed its claim that the records were privileged. *Id.* at 704-05. Then, after an attorney challenged the City's assertion of privilege a second time, on August 2, 2012 the City produced the e-mails in un-redacted form. *Id.* at 705.

Unlike in *Hobbs* and the case at bar, there is no indication in *Cedar Grove Compost* that the City was continuing to respond with further installments at the time that the requester's lawsuit was filed. At oral argument on appeal, the City's counsel cited *Hobbs* to argue that the requester could not seek penalties for fifteen (15) e-mails that were initially improperly redacted, because they had eventually been produced in un-redacted form prior to the requester filing the lawsuit. *Id.* at 714. Because the City's response to the request had been completed, the only issue was whether the requester was entitled to penalties for the City's refusal to produce un-redacted copies of non-privileged documents until after its wrongful claim of privilege was challenged multiple times: "No PRA provision or case law supports the City's claim that its pre-litigation

production of the 15 records somehow insulates it from all PRA penalties." *Id.* at 715. *Cedar Grove Compost* did not involve a situation where, as here, the requester initiated litigation while the agency was still producing responsive installments to the request. The PRA lawsuit of the requester in *Cedar Grove Compost* was not premature, whereas WCOG's lawsuit here was.

The trial court should have simply dismissed this matter in its entirety. Under *Hobbs* a requester has no right to relief in superior court until an agency completes its response to his or her request. Even with the limitations that the trial court imposed, a requester could make a request for a large volume of documents, and then serially initiate actions in court over records contained in each successive installment that are disputed. This Court should not interpret the PRA to allow such a multiplicity of actions arising out of a single request.

If this Court agrees with the trial court that *Hobbs* does not completely foreclose WCOG's suit as premature, it should nevertheless find that the trial court correctly restricted the parameters of the suit to those records claimed exempt at the time that the action was commenced. By stating that it was "not addressing any agency action or decisions made regarding installments produced after the initiation of this litigation," the trial court effectively held that *Hobbs* did place limitations on which

issues and records were ripe for review. In its Opening Brief, WCOG does not challenge this limitation, but it makes no effort to circumscribe its appeal to the parameters that the trial court imposed. As explained more fully *infra* in Section E, which addresses WCOG's arguments concerning alleged wrongful exemptions, almost all of the records that WCOG submitted for the court to consider at the time of the PRA hearing were produced in installments after the suit was initiated. These records fell outside of the parameters that the trial court held were proper for it to review.

D. The Trial Court Correctly Dismissed WCOG's Claims Under RCW 42.56.100 Based on Either the Failure to Adopt Rules or Provide the "Fullest Assistance"

In its Opening Brief, WCOG argues that the County is liable for a PRA violation under RCW 42.56.100 for "failing to adopt and enforce rules for the production of electronic records." Opening Brief, p. 45. In the trial court, WCOG characterized this claim as violation of a "duty of fullest assistance" under the statute. CP 2019-20. This claim was based upon WCOG's complaints that the County had (1) produced one installment of records on paper rather than as an electronic PDF file and (2) sent some installments by U.S. mail rather than by internet file transfer. *Id.* However the claim is characterized, the trial properly held it did not establish a PRA violation by the County.

1. The Trial Court Correctly Held the County Did Not Violate the PRA By Sending Some Installments of Records By U.S. Mail Rather Than Electronically

Principally relying on *ACLU v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 937 P.2d 1176 (1997), WCOG claimed below that the County violated the PRA by communicating and transmitting installments of records by U.S. mail rather than by e-mail or other electronic means. However, in *ACLU* the Court of Appeals held that the agency's refusal to send records by mail and its insistence that the Seattle-based requester travel to Blaine to review and copy records was a violation of the PRA. *Id.* at 694 – 95. The court focused on the provision of the PRA stating that "agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter." *Id.* (citing RCW 42.17.270, now re-codified as RCW 42.56.080). Based on the legislative history of this provision the court concluded, "This statement can only be interpreted to require agencies to provide copies of identifiable public records by mail when requested to do so." *Id.* at 695. Indeed, the Court of Appeals has subsequently recognized that an agency meets its PRA obligation to disclose records "by promptly mailing copies at a reasonable charge . . ." *Sappenfield v. Dept. of Corrections*, 127 Wn. App. 83, 89, 110 P.3d 808 (2005).

ACLU and the language of the PRA required the use of mail to transmit records when requested, not e-mail. Further supporting this interpretation of the PRA is the Legislature's 2017 passage of Engrossed House Bill 1595, which amends RCW 42.56.280 to refer to "requests received . . . by mail or e-mail" for the first time.[18] The effective date of this new legislation is July 23, 2017, long after the County sent the first five installments of records to WCOG's attorney by mail in 2015 and 2016. "Courts will presume that the legislature did not engage in vain and useless acts and that some significant purpose or object is implicit in every legislative enactment." *Oak Harbor Sch. Dist. v. Oak Harbor Educ. Assn.*, 86 Wn.2d 497, 500, 545 P.2d 1197 (1976). At the time in question, the PRA did not mention e-mail, and there was no obligation to use it.

More importantly, in *ACLU* the agency's refusal to mail the records to the requester amounted to a denial of access to the records:

> The Districts' refusal to mail the documents in response to the specific request to do so and the insistence that the requester travel to Blaine to inspect the records are not based on a reasonable interpretation of the act. <u>The District's position effectively denied access to the records.</u>
>
> . . . Because the District refused to mail copies of the identifiable public records, it effectively denied the requester the opportunity to have access to the document. <u>Access is the underlying theme of the act</u>.

[18] A copy of EHB 1595 is attached as **Appendix F.**

ACLU, 86 Wn. App. at 695 – 96 (emphasis added). As the trial court recognized in its decision, in *ACLU* the agency's "refusal had a practical effect of making it very difficult or impossible to obtain the responsive documents." CP 426. Here, in contrast, the requester received all records, which were transmitted either by U.S. mail or, in later installments, electronically.

The plain language of RCW 42.56.550(1), which requires that the plaintiff be a "person having been denied an opportunity to inspect or copy a public record," only allows a cause of action if a denial of access has occurred. The County did not deny WCOG access to records by transmitting the first five installments of records by mail instead of electronically. U.S. mail is both a reasonable way of sending records and one that the PRA specifically contemplates. *ACLU*, 86 Wn. App. at 694-95; *Sappenfield*, 127 Wn. App. at 89.

2. The Trial Court Correctly Held the County Did Not Violate the PRA By Sending One Installment of Records in Paper Format Rather Than as a PDF File

WCOG also complains that the County produced its first installment of records in paper format rather than sending it as a PDF file or in other electronic format. Prior cases have repeatedly held that the PRA contains no requirement for producing records in an electronic format. *See, e.g., Benton County v. Zink*, 191 Wn. App. 269, 282, 361

P.3d 801 (2015); *Mitchell v. Dept. of Corrections*, 164 Wn. App. 597, 606, 277 P.3d 670 (2011); *Mechling v. City of Monroe*, 152 Wn. App. 830, 849, 222 P.3d 808 (2009). WCOG focuses on provisions from the AGO model rules, but these rules are advisory only and do not bind agencies. WAC 44-14-00003; *West v. Dept. of Licensing*, 182 Wn. App. 500, 516, 331 P.3d 72 (2014).

While the Court of Appeals in *Mechling* and *Mitchell* recognized that a trial court has discretion to require an agency to disclose records electronically where it is reasonable to do so, no case has treated an agency's failure to produce records electronically as a PRA violation for which penalties are imposed. *Mechling*, 152 Wn. App. at 850 ("on remand the trial court shall determine whether it is reasonable and feasible for the City" to produce records electronically); *Mitchell*, 164 Wn. App. at 607 (affirming trial court ruling not requiring electronic production). Since the County had long been producing records to WCOG electronically, there was no need for the court to consider such relief below. WCOG was not denied access to records when one installment was mailed to it in paper format rather than produced electronically as a PDF file, and the trial court correctly rejected its claim that this action by the County gave rise to a cause of action under the PRA.

3. RCW 42.56.100 Does Not Create a Separate and Independent PRA Cause of Action

Additionally, RCW 42.56.100 does not create a separate theory of PRA liability for which penalties and fees are available. RCW 42.56.100 is concerned only with challenges to an agency's adoption of rules. *See, e.g., Gronquist v. Dept. of Corrections*, 159 Wn. App. 576, 247 P.3d 436 (2011); *Sappenfield*, 127 Wn. App. at 89. WCOG is misguided in citing *Kleven v. DesMoines*, 111 Wn. App. 284, 44 P.3d 887 (2002), and *ACLU, supra*, in support of its claim that it can bring a separate PRA cause of action based on a failure to adopt rules or the duty of "fullest assistance." As previously described above, in *ACLU* the agency's refusal to mail records from Blaine to the Seattle-based requester was tantamount to denying the records, giving rise to relief under RCW 42.56.550(1). *ACLU*, 88 Wn. App. at 695-69. In contrast, WCOG was not denied access to any records by virtue of the County's decision to mail some installments rather than sending them electronically.

In *Kleven*, the requester claimed the agency was liable under the part of the statute requiring rules "to protect records from damage or disorganization," because it had mislabeled a single audiotape that was responsive to the request. *Kleven*, 111 Wn. App. at 297. The Court of Appeals rejected this claim, given that the agency promptly produced this

mislabeled tape and corrected previous erroneous representations that it made to the court. *Id.* As the trial court below correctly observed, "The record in *Kleven* contained no information to show that the City had not adopted or enforced rules and regulations, and so the Court of Appeals did not address that issue." CP 426.

In some cases, the court has granted injunctive relief, as opposed to penalties and fees, based upon the duties set forth in RCW 42.56.100. For example, in *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 327 P.3d 600 (2013), the court entered an injunction requiring the Seattle Housing Authority ("SHA") to produce records, but this relief was only afforded by the court after it first held that a PRA violation based on the SHA's failure to provide RAC with requested records was established. *Id.* at 446-47. Ancillary to this holding, the trial court exercised its discretion and ordered SHA to "publish procedures regarding public records requests; to publish a list of applicable exemptions; and to establish policies governing redaction, explanations of withholding, and electronic records." *Id.* As the court explained, "the trial court . . . found it necessary to order SHA to establish such policies and procedures in order to ensure that RAC was provided complete relief." *Id.* at 447 (citing *Dare v. Mt. Vernon Inv. Co.*, 121 Wash. 117, 120, 209 P. 609 (1922). This relief was afforded by the court not under the PRA itself, but pursuant to

the court's broad discretionary equitable powers. *Resident Action Council*, 177 Wn.2d at 44-46.

A plaintiff must satisfy standing requirements before the court will consider an injunction. As the Supreme Court noted in *Resident Action Council*, injunctive relief requires "(1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) actual and substantial injury as a result." *Id.* at 445-46 (citing *Wash. Fed'n of State Employees v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983)). The plaintiff in *Resident Action Council* met the standing requirements for injunctive relief, because the court held "RAC has a clear right to appropriate production of requested documents, SHA has refused to produce those documents, and RAC remains without the public records it has requested." *Resident Action Council*, 177 Wn.2d at 446.

Here, however, WCOG did not establish a right to additional records. Further, it did not request an injunction or brief the requirements for injunctive relief, even though the trial court instructed the parties to raise all issues at the hearing they wished for the court to address. 01/31/17 RP at 33. The requirements for injunctive relief were not satisfied. By the time of the hearing, the County had long been producing records electronically and using Filelocker, an internet file transfer system. Consequently, the trial court had no reason to consider injunctive relief.

More directly on point to the claim asserted by WCOG under RCW 42.56.100 is a recent unpublished decision, *Chen v. City of Medina*, 2014 Wash. App. LEXIS 343 (Wash. App. 2014).[19] Because the plaintiff in *Chen* did not make a specific challenge to any of the agency's rules, the court declined to address his arguments that the agency was liable for failing to adopt rules. *Id.* at *16. Addressing his remaining complaints about the manner in which the City responded to the request the court held, "The PRA provides no separate cause of action for an agency's failure to provide the fullest assistance to a requester." *Id.*

The County adopted "reasonable rules and regulations" as required by RCW 42.56.100 by adopting Pierce County Code 2.04, "Public Records Inspection and Copying Procedures." CP 261-67. Like the plaintiff in *Chen*, in the trial court below WCOG did not identify any rule in the County code that it was challenging, nor did it give any description of a rule that it believed was mandated. WCOG bears the burden of proof in challenging any of the County's rules. *See Adams v. Dept. of Corrections*, 189 Wn. App. 925, 952, 361 P.3d 749 (2015) (citing *Baldwin v. Sisters of Providence, Inc.*, 112 Wn.2d 127, 135, 756 P.2d 298 (1989)). Like the plaintiff in *Chen*, WCOG's other complaints about the manner that the County responded to the request, the merits of which are

[19] For the Court's convenience, a copy of this unpublished opinion is attached as **Appendix G.**

addressed above, do not give rise to an independent cause of action for failing to provide the "fullest assistance."

E. The Trial Court Correctly Held the County's Exemptions Were Proper

1. WCOG Failed to Identify the Specific Records it Was Challenging and Has Not Limited its Appeal to the Circumscribed Group of Records the Trial Court held were Properly Before It

WCOG's complaint that the trial court reversed the burden of proof on its wrongful exemption claims is disingenuous. Under the PRA, the court "may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records." RCW 42.56.550 (emphasis added). The trial court merely expected that the plaintiff – as the party initiating the lawsuit – would define the scope of the dispute by identifying the "record or class of records" it was being asked to rule upon.

The trial court noted its frustration both at the hearing and in its decision that, "significantly, the Plaintiff [WCOG] has failed to even identify which specific records are at issue that purportedly lost their work product privilege because they were shared." CP 427; *see also* 04/21/17 RP at 46.. Requiring the requester, as the plaintiff, to identify which records it contends are wrongfully withheld or redacted is necessary for several reasons. The PRA places the burden of proof "on the agency to

establish that refusal to permit and 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). However, the plaintiff still bears the burden of proving the essential elements of its claim. *Adams*, 189 Wn. App. at 952. In a suit where an agency's production is voluminous and continuing in nature, the plaintiff is in the best position to define the scope of what records are in dispute. Here, by the time of the hearing, the County had disclosed over 9,000 records. An agency should not be required to explain thousands of pages of redactions that are not even being challenged by the requester.

The requester's identification of the records at issue is also necessary in order for the court and other parties to the action to know whether *in camera* review is necessary. The court may need to perform an *in camera* review of some records to determine whether they are properly claimed as privileged or work product. The PRA specifically contemplates that *in camera* review of records by the court will be necessary in some situations. RCW 42.56.550(3). In the case at bar, the trial court made clear early in the case that it would only perform *in camera* review if it were authorized by court order. CP 24; 04/29/16 RP at 11. Before an agency or the court can possibly make an informed decision

about whether such *in camera* review is necessary, the disputed records must first be identified by the plaintiff requester.

Additionally, in this case the court held that only certain records were properly before it in light of the agency's ongoing installments responsive to the request. The plaintiff requester must be required to identify the records it is challenging. Otherwise, there is no way for to know whether the challenged records are outside the proper scope of review. Thus, the trial court correctly held that a requester has the burden of identifying which disputed records it is asking the court to rule upon.

2. The County Did Not Waive Privilege in Records Shared with Lindquist, WAPA, WSAMA, and Public Employees in *Nissen*, Because All These Parties Had a Common Interest in the Litigation

Although it failed to identify the specific documents it was challenging, at the PRA hearing WCOG generally claimed that the County's exemptions of privilege in connection with the common interest doctrine were improper. More specifically, WCOG focused on correspondence between the attorneys for the County, Lindquist, WAPA, WSAMA, and Public Employees.[20] According to WCOG, any attorney-client or work product privileged documents, when shared between these

[20] WCOG attempts to create a false controversy over whether the County shared a common interest with the Attorney General's Office ("AGO") in *Nissen*. WCOG is unable to point to a single record that the County shared with the AGO in *Nissen* that it has claimed is exempt.

parties, would be waived. However, WCOG's argument misapprehends the nature of the common interest (or joint defense) doctrine.

"The common interest doctrine is an exception to the general rule that the voluntary disclosure of a privileged attorney client or work product communication to a third party waives privilege." *Kittitas County v. Allphin*, 195 Wn. App. 355, 368, 381 P.3d 1202, 2016 Wash. App. LEXIS 1895 (2016) (citing *Avocent Redmond Corp. v. Rose Elecs., Inc.*, 516 F.Supp.2d 1199, 1202 (W.D. Wash. 2007));[21] *see generally* Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:35 (West Group, 2nd Ed. 1999, as supplemented 2012). The doctrine does not require a complete alignment of interests, but rather only that two or more parties share a "common claim or defense." *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010); *Allphin*, 195 Wn. App. at 368. No formal or written common interest or joint defense agreement ("JDA") is required for a common interest or joint defense relationship to arise. *Allphin*, 195 Wn. App. at 359; *United States v. Gonzalez*, 669 F.3d 974, 979 (9th Cir. 2012). "When coparties are in the midst of or preparing for litigation through a joint defense strategy, courts have virtually assumed (without focusing on the nature of each party's interests and how they might diverge) that a sufficient community of interests exists, because of the

[21] *Allphin* was published in part. A copy of both the published and unpublished portions of the opinion is attached as **Appendix H.**

common positions in the litigation, to justify the sharing of otherwise privileged communications without that disclosure constituting a waiver of the privilege." *Rice* at § 4:36 (citing cases).

"[A] JDA may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation." *Gonzalez*, 669 F.3d at 979. As the Ninth Circuit has explained:

> "Where an attorney furnishes a copy of a document entrusted to him by his client to an attorney who is engaged in maintaining substantially the same cause on behalf of other parties in the same litigation, without an express understanding that the recipient shall not communicate the contents thereof to others, the communication is made not for the purpose of allowing unlimited publication and use, but in confidence, for the limited and restricted purpose to assist in asserting their common claims. The copy is given and accepted under the privilege between the attorney furnishing it and his client. For the occasion, the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents."

Continental Oil v. United States, 330 F.2d 347, 350 (9th Cir. 1964)(quoting *Schmitt v. Emery*, 2 N.W.2d 413, 417 (Minn.1942)); *see also Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965)(holding "where two or more persons who are subject to possible indictment in connection with the same transaction make confidential statements to their attorneys, these statements, even though they are exchanged between

attorneys, should be privileged to the extent they concern common issues and are intended to facilitate representation in possible subsequent proceedings.") In each of the above cases, the common interest doctrine applied to prevent the waiver of privilege based upon implication and the nature of the situation. T hus, contrary to WCOG's arguments, evidence of an express agreement – either written or oral – is not always required.

For example, in *Allphin* the Kittitas County Prosecutor's Office exchanged e-mails with the Washington State Department of Ecology regarding an enforcement action the County had brought against a company that the County alleged had unlawfully handled waste without required permits. *Allphin*, 195 Wn. App. at 358-59. When the company's president made a request to the County under the PRA for the e-mails, the County claimed they were exempt as work product and that sharing them with Ecology did not result in a waiver of the privilege. *Id.* at 359. The Court of Appeals upheld the trial court's determination that the e-mails remained exempt as work product, even though no formal agreement had been executed, because the two entities had a common interest and were on the same "legal team" in the enforcement action. *Id.* at 369-70. There was no evidence cited in *Allphin* of an express agreement.

The record in *Nissen* similarly makes clear that the relevant parties had a common interest relationship and were on the same "legal team."

The County and Prosecuting Attorney Lindquist took the same position from the inception of the *Nissen* litigation: both argued that the records at issue were not public records under the PRA and that requiring their disclosure would result in a violation of the constitutional rights of public employees.

A party to an appeal can have a common interest with amicus supporters.[22] The record in *Nissen* provides contemporaneous statements from each of the amicus organizations at issue – WAPA ,[23] WSAMA ,[24] and Public Employees[25] – showing they were joining the case to advocate for precisely the same interests that the County and Prosecuting Attorney Lindquist were. WCOG's counsel even wrote a letter to a state

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[22] *See, e.g., Judicial Watch v. Dept. of Justice,* 432 F.3d 366 (D.C. Cir. 2005)(documents relating to government's participation as amicus held exempt under FOIA as work product); *Strang v. Collyer*, 710 F.Supp. 9, 12-13 (D.C. Dist. 1989)(NLRB properly asserted work product over memoranda and legal research in connection Supreme Court's request for amicus brief).

[23] "[WAPA] is a statewide association of the thirty-nine-elected prosecuting attorneys. WAPA assists the prosecuting attorneys in carrying out the statutory duties found at 36.27.020 . . . Prosecutors statewide are keenly interested in protecting for themselves, their deputies, their clients, and their clients' staff, their right to privacy. Prosecutors are also concerned with their ability and the ability of their clients to recruit and retain qualified employees. . . . The WAPA *amicus curae* brief will explain how the Fourth Amendment and article I, section 7 of the Washington Constitution preclude the discovery contemplated by the Court of Appeals' decision." CP 109.

[24] "The members of WSAMA are the attorneys who are responsible by law for providing legal advice to city employees, including public records officers . . . The trial court's opinion in this case poses a threat to the privacy of employees and officials, many of who would be unwilling to agree to their employer search through their personal devices." CP 143-45, 2094-96.

[25] "The *amici* are public employee organizations. . . .[T]his Court needs to know how those employees' lives and ability to perform their jobs serving the public will be adversely impacted if Nissen's interpretation of the PRA and evasion of constitutional principles is not reviewed by this Court." CP 171-76.

representative stating that WAPA, WSAMA, and the Public Employees amici worked together with the County and Lindquist in the *Nissen*.[26] While WCOG makes much of the lack of a formalized agreement, the law is clear that no formal agreement is required and the parties must simply "intend and agree to undertake a joint defense effort." *Allphin*, 195 Wn. App. at 368. Again, a common interest relationship arises by implication in circumstances where, as here, parties are communicating about their common interests in pending litigation. *Gonzalez*, 669 F.3d at 979. The record in *Nissen* shows that this is precisely what occurred.

The County, Prosecuting Attorney Lindquist, WAPA, WSAMA, and Public Employees supported one another in the *Nissen* litigation for purposes of furthering their common interests in the imminent appellate decision, which would establish precedent and affect each of them (and their constituents) in the same way.[27] As a result, the trial court correctly

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[26] WCOG's counsel's letter states that "WAPA made a political decision to support Lindquist whether he was right or not" and that the Public Employee amicus group's "briefs . . . were pro-Lindquist garbage." CP 270.

[27] As in the trial court below, WCOG makes the untenable claim that there is no distinction between WAPA and the individual Prosecuting Attorneys of the State of Washington. WCOG makes the same claim regarding WSAMA and its individual members. This argument is meritless. WAPA and WSAMA are separate legal entities, which are distinct from their individual members and the municipalities that their members represent. CP 28, 274-94. Regardless of the opinions that individual members of these organizations had about the County's position in *Nissen*, the organizations themselves decided to take the same position as the County. Thus, the organizations and their attorneys in the litigation, not the organizations' individual constituents, had a common interest relationship with the County.

held no waiver resulted from their sharing of confidential information. Its holding should be affirmed.

3. Records That WCOG's Counsel Later Obtained From Sources Other Than the County Are Immaterial

WCOG is misguided in claiming that its receipt, long after its PRA request was made to the County, of records relating to *Nissen* from WAPA or other entities undermines the County's assertion of common interest. The decision to waive privilege by other entities that are parties to a common interest arrangement with the County is irrelevant to whether the County's decision to assert privilege is proper. "[T]he case law is clear that one party to a JDA cannot unilaterally waive the privilege for other holders." *Gonzalez*, 669 F.3d at 982. "It is fundamental that 'the joint defense privilege cannot be waived without the consent of all parties to the defense.'" *John Morrell & Co. v. Local Union 304A of UFW*, 913 F.2d 544, 556 (8th 1990) (quoting *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90- F.R.D. 21, 29 (N.D. Ill. 1980)). This principle is also set forth in the Restatement:

> Any member of a common-interest arrangement may invoke the privilege against third persons, even if the communication in question was not originally made by or addressed to the objecting member.
>
> In the absence of an agreement to the contrary, any member may waive the privilege with respect to that person's own communication. Correlatively, a member is not authorized to waive the privilege for another member's communication.

Restatement (Third) of the Law Governing Lawyers § 76, cmt. g. (2000).

Thus, the County is entitled to assert its privilege in response to a PRA request based on a common interest arrangement, regardless of whether WAPA or any other groups involved in *Nissen* have decided to waive a privilege or not claim exemptions. Further unsupported is WCOG's claim that the County must prove that WAPA or the other sources from which WCOG obtained these records decided to waive their privilege as part of its burden in this case. There is absolutely no authority requiring an agency to prove why another agency decided not to claim an exemption when responding to a different PRA request.

4. WCOG's Inflammatory Conflict of Interest Arguments Are Immaterial and Unsupported

WCOG also attempts to muddy the waters by claiming that Prosecuting Attorney Lindquist had a conflict of interest in the *Nissen* case. Even if this incorrect assertion were accepted *arguendo*, the existence of such a conflict is not probative of any issue in this case. WCOG confuses the issue of a conflict of interest with the issue of whether an attorney-client relationship between the County and Prosecuting Attorney Lindquist existed in the *Nissen* case giving rise to the attorney-client and work product privileges. In determining whether records are properly withheld or redacted based on these privileges, the court is concerned only with the latter issue.

Regardless of whether a conflict ever arose between the County and any of its attorneys in *Nissen*, there is no dispute that an attorney-client relationship existed between the County and those attorneys. RCW 36.27.020; *Kleven v. King County Prosecutor*, 112 Wn. App. 18, 25, 53 P.3d 516 (2002) ("[B]y statute, the prosecuting attorney is the legal advisor for all county officers and agencies."); *Harter v. King County*, 11 Wn.2d 584, 595, 119 P.2d 919 (1941) ("[W]here the board [of county commissioners] remains silent, it is bound by the bona fide representation of the county by the prosecuting attorney, who derives his primary authority, not from the board, but from the statutes."). WCOG cites no authority establishing that a conflict of interest arising during the course of an attorney-client relationship results in the destruction of the attorney-client or work product privileges.

The trial court correctly recognized that WCOG's argument is unsupported:

> The final argument by the Plaintiff on this issue is that a conflict of interest destroys the common interest doctrine. The Plaintiff explains that no court has made such a legal ruling. This Court declines to issue a new statement of law, especially when the record is insufficiently developed to do so.

CP 427. WCOG's argument is not merely unprecedented, it is contrary to law. Both Washington law and the Rules of Professional Conduct expressly prohibit a lawyer from revealing client confidences, even after the attorney-

client relationship is terminated. RPC 1.9 (c)(2); RCW 5.60.060; Restatement (Third) of the Law Governing Lawyers § 77, cmt. b. (2000) ("The attorney-client privilege continues indefinitely"); *see also* ABA Formal Opinion 94-385 (either lawyer or client may invoke work product, and lawyer is obligated to do so on behalf of former client). Thus, just as the trial court declined to address WCOG's conflict of interest allegations, so too should this court.

Should the court reach the issue, it should hold no conflict of interest arose in *Nissen*. Prosecutors and other public attorneys routinely represent both the government employer and individually sued government employees in lawsuits. Indeed, offices of prosecutors and attorneys general regularly defend their prosecutors and assistant attorneys general who are named as defendants.[28] For years, municipalities have also defended employees and officials who are named as defendants in PRA suits. *See, e.g., Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998).

Furthermore, municipalities and state agencies regularly assert the privacy interests of their employees and officials in PRA cases, <u>because it is in the government's interest to protect the privacy interests of government</u>

[28] *See e.g. Creelman v. Svenning*, 67 Wn.2d 882, 410 P.2d 606 (1966)(malicious prosecution claim); *Whatcom Cty. v. State*, 99 Wn. App. 237, 993 P.2d 273 (2000); *Clarke v. State Attorney Gen.'s Office*, 133 Wn. App. 767, 138 P.3d 144 (2006); *State v. O'Connell*, 83 Wn.2d 797, 523 P.2d 872 (1974), supplemented, 84 Wn.2d 602, 528 P.2d 988 (1974).

officials and employees.[29] WCOG's claim that the County's interest is always to disclose all records requested in response to a PRA request – regardless of anyone's privacy interests in those records – is nonsensical and contrary to law.[30] Despite that they were both parties in *Nissen*, the County and Prosecuting Attorney Lindquist's positions in the litigation were not adverse to one another.

WCOG's conflict of interest claim is not merely wrong, it has been twice rejected by Superior Court judges in other proceedings. The issue was raised and rejected by this court in both the *Nissen* case itself and in a case involving a recall petition against Prosecuting Attorney Lindquist. CP 315-35, 322, 330-33. WCOG should be collaterally estopped from re-litigating this meritless claim.

Collateral estoppel applies to preclude re-litigation of an issue when (1) the identical issue was decided in a prior adjudication; (2) there was a

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[29] *See, e.g., O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010)(city and deputy mayor both represented by same attorneys in opposing disclosure of deputy mayor's private e-mails under PRA); *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016)(city attorneys as well as private counsel defended both city and city councilman from PRA suit seeking records from councilmen's private email account); *West v. Thurston County*, 168 Wn. App. 162, 183-84, 275 P. 3d 1200 (2012)(law firm represented both County and itself against PRA suit requesting its billing records); *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Col. 2011)(Attorney General defending suit seeking Governor's personal cell phone records under state public records act); *City of San Jose v. Superior Court*, 225 Cal.App.4th 75 (Cal. App. 2014)(City attorney defended suit against city and its officials in public record act suit seeking officials' private voicemail, emails and text messages).

[30] In considering this issue, it is important for the court to keep in mind that the *Nissen* PRA suit originally asserted that not merely that work-related text messages on a private cell phone were public records, but that all records on a private cell phone that was sometimes used for work-related purposes were subject to disclosure. CP 37-38.

final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior adjudication; and (4) application of the doctrine will not work an injustice on the party against whom the doctrine is to be applied. *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). Privity exists when two parties have a "mutual interest and shared common purpose" in successful prosecution of a claim. *Barlindahl v. City of Bonney Lake*, 84 Wn. App. 135, 143, 925 P.2d 1289 (1996). Where a party was fully acquainted with the character of a prior action, such as by participating as a witness, and was interested in its results, that party is estopped by the judgment in the prior action as if it had been a party. *Hackler v. Hackler*, 37 Wn. App. 791, 795, 683 P.2d 241 (1984); *see also McDaniels v. Carlson*, 108 Wn.2d 299, 307, 738 P.2d 254 (1987)(recognizing that the rule in *Hackler* represents an exception to the strict privity requirement of collateral estoppel).

Had a conflict of interest existed in *Nissen*, the court had the authority to order disqualification of any conflicted attorneys. *See, e.g., In re Firestorm 1991*, 129 Wn.2d 130, 139-40, 916 P.2d 411 (1996). Neither the plaintiff in *Nissen* nor WCOG, who was an amicus party that supported her position during the appeal, ever even asked the court for disqualification. When the Pierce County Executive moved for the appointment of a Special Prosecuting Attorney in *Nissen* after remand from the Supreme Court based

on a claim of conflict, the Chair of the County Council objected, and the court denied the Executive's motion: "I don't find that there's been a sufficient showing that there is absolutely a conflict." CP 322, 315-35. The Pierce County Superior Court also previously rejected the claim that Prosecuting Attorney Lindquist committed any misconduct in *Nissen* when the court dismissed a portion of a petition for recall based on the same allegation. CP 330-33. This court should thus disregard WCOG's conflict of interest claims, which have been previously rejected by other judges.

F. The Trial Court Correctly Held the County's Exemption Logs Were Adequate

An agency withholding or redacting a record in response to a PRA request must specify the exemption relied upon and give a brief explanation of how the exemption applies to the record. *Sanders*, 169 Wn.2d at 846; RCW 42.56.210(3). WCOG's claim that the County's exemption logs are inadequate in the same way the logs in *Sanders* were is belied by the record. In *Sanders*, the State's exemption logs "provided information about [exempt records] such as their authors recipients, and dates of creation," but they "did not contain any facts or explanation of how its claimed exemptions applied to each document withheld." *Sanders*, 169 Wn.2d at 837. The court explained, "The identifying

information about a given document does not explain, for example, why it is work product under the PRA's 'controversy' exemption." *Id.* at 845-46.

In contrast, where the County relied on the "controversy" exemption in RCW 42.56.290, its logs provided far more than simply the identifying information about the record. For example, work product includes both factual information that is collected or gathered by an attorney in anticipation of litigation and an attorney's legal research, theories, opinions, and conclusions. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605-06, 963 P.2d 869 (1998). Mindful of this nuance, where the County relied upon work product to claim a record was exempt, it provided detailed explanation about what type of work product information the record contained.[31] Given that the request asked for

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[31] The following are examples of explanations given by the County in its logs for why the "controversy" exemption applies to specific documents that were work product:

> (1) RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash. App. 221 (2009) | Work Product – Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.
>
> (2) RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash. App. 221 (2009) | Work Product – Mental Impressions/legal opinions | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v. Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871876, Court of Appeals II 448521.
>
> (3) RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash. App. 221 (2009) | Work Product – Mental Impressions/legal opinions | Redacted or exempted material in prosecutor records contain confidential communications

records regarding *Nissen*, there has never been any question about what "controversy" these work product records were related to.

WCOG cites no authority supporting its claim that the County's exemption logs required it to state "(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." WCOG's Opening Brief, p. 7. The trial court correctly recognized the common interest doctrine is not an independent privilege, but is instead "merely an exception to waiver of privilege." *Sanders*, 169 Wn.2d at 853. The County need only provide sufficient information to explain the basis for the applicable privilege that exempts all or part of the record. While *Sanders* and RCW 42.56.210(3) require that an agency provide an explanation its exemptions, they do not require an agency to explain why a privilege has not been waived.

In the unpublished portion the Court of Appeals' opinion in *Allphin*, the court recognized that exemption logs similar in nature to the County's logs here were adequate, even though they did not explain the nature of the common interest that prevented waiver from occurring:

> from multiple parties pertaining to their common claim or defense, these communications remain privileged as to those outside their group.

CP 570-632.

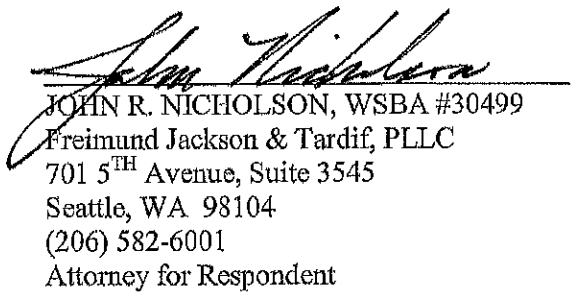
> Given that the common interest doctrine is merely a common law exception to waiver and not a separate exemption, the County's explanation that the e-mails were "work product" was sufficient to explain why the County was withholding them. Between this explanation and the County's description of each e-mail's contents, we conclude the County's exemption logs were adequate.

Allphin, 2016 Wash. App. LEXIS 1895, ***28-29 (2016) (emphasis added).[32] Here, the County's logs provided the same type of information. The trial court's holding that they were adequate should be affirmed.

V. CONCLUSION

The trial court correctly dismissed WCOG's suit under the PRA against the County. For all the forgoing reasons, its order of dismissal with prejudice should be affirmed.

RESPECTUFLLY SUBMITTED this 13th day of April, 2018.



JOHN R. NICHOLSON, WSBA #30499
Freimund Jackson & Tardif, PLLC
701 5TH Avenue, Suite 3545
Seattle, WA 98104
(206) 582-6001
Attorney for Respondent

[32] See **Appendix H.**

CERTIFICATE OF SERVICE

I certify that the foregoing was served by the method indicated below to the following this 13th day of April, 2018.

Attorneys for WCOG William John Crittenden Attorney at Law 12345 Lake City Way NE 306 Seattle, WA 98125-5401 *Attorney for Appellant*	☒ ☒ ☒	U. S. Mail E-mail bill@billcrittenden.com E-served via Court Portal: bill@billcrittenden.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of April, 2018, at Olympia, WA.

COURTNEY GRUBB

APPENDIX A

Pierce County
Office of Prosecuting Attorney

REPLY TO:
CIVIL DIVISION
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
FAX: (253) 798-6713

MARK LINDQUIST
Prosecuting Attorney

Main Office: (253) 798-6732
(WA Only) 1-800-992-2456

February 21, 2017

William John Crittenden
Attorney at Law
12345 Lake City Way NE 306
Seattle WA 98125-5401

RE: Public Records Request Dated April 1, 2015 Concerning Glenda Nissen v. Pierce County litigation; PA Reference No. 15-0516

Dear Mr. Crittenden:

Your public record request dated April 1, 2015 asked for the following records from the files of the Pierce County Prosecuting Attorney:

(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.
(e) All records, including correspondence, email notes, drafts and word processing files related in any way to the amicus briefs filed by the Pierce County prosecuting Attorneys' Association in the Glenda Nissen v. Pierce County litigation.
(f) Any records in the possession of deputy prosecutors Scott Peters, Jared Ausserer, legal assistant Christina Smith or other support staff or any records on the computers, email accounts of those prosecutors and staff.

To date, we have released to you the following installments:

1st Installment	Date Produced: 05/11/2015	Pages: 1-533
2nd Installment	Date Produced: 08/12/2015	Pages: 534-766
3rd Installment	Date Produced: 12/21/2015	Pages: 767-1211
4th Installment	Date Produced: 01/28/2016	Pages: 1212-1513
5th Installment	Date Produced: 03/22/2016	Pages: 1514-1766
6th Installment	Date Produced: 05/13/2016	Pages: 1767-2080

7th Installment	Date Produced: 06/29/2016	Pages: 2081-2502
8th Installment	Date Produced: 08/16/2016	Pages: 2503-3732
9th Installment	Date Produced: 09/15/2016	Pages: 3733-5288
10th Installment	Date Produced: 10/17/2016	Pages: 5289-7030
11th Installment	Date Produced: 11/18/2016	Pages: 7031-8847
12th Installment	Date Produced: 12/22/2016	Pages: 8848-9336

At this time, we are prepared to release to you our thirteenth installment of responsive records. In this installment, three hundred and seventy-nine (379) pages were located that are responsive to your request. All of these pages will be released to you. Please see the exemption log that has also been uploaded to Filelocker for additional information regarding the exemptions and redactions that apply to these records.

I did not produce any email attachments that contained pleadings that have been served or filed in Nissen. If you would like to receive copies of any of those attachments, please advise.

This installment consists of emails that were produced electronically. There is no cost to you to receive them through Filelocker. The email address you have supplied of wjcrittenden@comcast.net, will receive an email informing you that I have shared a file with you and a link to the document that will enable you to download it to your computer. Filelocker automatically deletes files after twenty-one days. The file will be available for you to retrieve until March 14, 2017. If you need additional time to access the records, please advise so arrangements can be made to extend the retrieval date. If you have questions or difficulty accessing the file, please contact me so that I may address the issue and or redirect delivery of the records.

Once I have received confirmation that you have downloaded this installment of records, we will commence with production of the next installment. The next installment of records will be available within five (5) weeks of the date the 13th installment of records is retrieved.

If you have any questions, believe we have somehow misunderstood your request(s) or wish to clarify your request, please do not hesitate to contact me. Be advised, if I have not heard from you within thirty (30) days, I will consider this matter to be abandoned and will close this request.

Sincerely,

T. BROWN
Public Records Officer

TB
Enclosure

DECLARATION OF MAILING

I declare under penalty of perjury that on this date I deposited a properly addressed envelope/document directed to the individual and address referenced above, into the

☑ Filelocker Internet transfer service.
☐ mails of the USA with appropriate pre-paid postage.

At time of deposit, said envelope contained the document to which this declaration is affixed and if any noted, the documents indicated.

Dated: 2/21/17 at Tacoma Washington.

APPENDIX B

16-2-01006-34
ORDSMWP 94
Order of Dismissal With Prejudice
1698961

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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2017 JUL 21 PM 1:46

Linda Myhre Enlow
Thurston County Clerk

☒ EXPEDITE (if filing within 5 court days of hearing)
☐ Hearing is set:
Date:
Time:
Judge/Calendar: Carol Murphy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

WASHINGTON COALITION FOR OPEN GOVERNMENT, a Washington nonprofit corporation, Plaintiff, vs. PIERCE COUNTY, Defendant.	NO. 16-2-01006-34 STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE

I. STIPULATION

Plaintiff Washington Coalition for Open Government (WCOG) and Defendant Pierce County hereby stipulate to entry of the following order.

DATE: 7-13-2017	DATE: 7/12/17
FREIMUND JACKSON & TARDIF, PLLC	
John R. Nicholson, WSBA #30499 Attorneys for Defendant Pierce County	William John Crittenden, WSBA # 22033 Attorney for Plaintiff

FREIMUND JACKSON & TARDIF, PLLC
701 FIFTH AVENUE, SUITE 3545
SEATTLE, WA 98104
TELEPHONE: (206) 382-6001
FAX: (206) 466-6085

II. ORDER

This matter came before the Court for a hearing on the merits on April 21, 2017. The Court issued a *Letter Ruling* dated June 15, 2017, which is attached hereto as Appendix A. The *Letter Ruling* disposes of all issues in this case and requires dismissal of plaintiff's claims.

IT IS HEREBY ORDERED THAT plaintiff's claims are dismissed with prejudice for the reasons set forth in the *Letter Ruling*.

DATED this 18th day of July, 2017.

Carol Murphy
JUDGE CAROL MURPHY

Presented By:	Approved as to Form and Notice of Presentation Waived:
FREIMUND JACKSON & TARDIF, PLLC	
John R. Nicholson, WSBA #30499 Attorneys for Defendant Pierce County	William John Crittenden, WSBA # 22033 Attorney for Plaintiff

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Superior Court of the State of Washington
For Thurston County

Anne Hirsch, *Judge*
Carol Murphy, *Judge*
James Dixon, *Judge*
Erik D. Price, *Judge*
Christine Schaller, *Judge*
Mary Sue Wilson, *Judge*
John C. Skinder, *Judge*
Chris Lanese, *Judge*

Pamela Hartman Beyer, *Court Administrator*
Indu Thomas, *Court Commissioner*
Jonathon Lack, *Court Commissioner*
Nathan Kortokrax, *Court Commissioner*

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Telephone: (360) 786-5560 Website: www.co.thurston.wa.us/superior

June 15, 2017

William J. Crittenden
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Seattle, WA 98104-7097

COURT'S LETTER RULING

RE: *Washington Coalition for Open Government v. Pierce County*
Thurston County Cause No. 16-2-01006-34

Dear Counsel:

This matter came before the Court for a merits hearing set by the Court for April 21, 2017.

The Court considered oral argument and the pleadings, including the declarations and exhibits on file. The hearing was based on affidavits as allowed by RCW 42.56.550(3). At the merits hearing, the Court considered several issues, including:

(1) whether to sustain evidentiary objections regarding some of Plaintiff's declarations;
(2) whether the duty to offer "fullest assistance" was violated because the first installments were produced by mail and not electronically and because there is not an agency policy providing for electronic submissions;
(3) whether the exemptions cited by Pierce County were applicable; and
(4) whether the exemption logs were inadequate based upon the argument that the description lacked specificity.

The Court now issues a decision in favor of Pierce County on the merits.

1. Evidentiary Objections to the Plaintiff's Declarations

As a threshold matter, Pierce County challenges the admissibility of declarations by attorneys Arthur Lackman and James Smith, and to numerous exhibits that allegedly are based on lack of relevance and hearsay. Regarding the attorney declarations, this Court holds that they contain improper expert testimony on legal conclusions. This Court will not consider such expert opinions contained within the declarations. *Bell v. State*, 147 Wn.2d 166, 179 (2002) (holding that expert testimony on legal issues is not admissible).

Regarding the objections to the exhibits, the Court has reviewed the exhibits and they are not stricken. Pierce County's objection was too broad and unspecific for this Court meaningfully to apply, consisting of a two-sentence objection to 28 documents. However, this Court is aware of the rules of evidence and has considered all of the declarations and exhibits in light of admissibility standards and the Court's ruling above.

2. Duty of Fullest Assistance

The Plaintiff argues that Pierce County violated the Public Records Act (PRA) by not having a policy to allow electronic transmittal of documents and by not, in fact, providing electronic documents. The facts regarding this argument are essentially uncontested. The Court does not find the Plaintiff's argument persuasive.
Under RCW 42.56.100:

> Agencies shall adopt and enforce reasonable rules and regulations . . . consonant with the intent of [the PRA] to provide full public access to public records. . . . Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information."

The agency bears the burden of proof under this statute. *Neighborhood Alliance of Spokane Co. v. County of Spokane*, 172 Wn.2d 702, 715 (2011).

In this case, the first installments were provided by mail, but later and ongoing installments are being provided electronically due new technology that Pierce County implemented during its response period. There is no showing here that the Plaintiff was actually denied access to records because they were supplied by mail. This Court finds that the method of supplying records did not violate the PRA.

The parties disagree on whether there is an independent cause of action for a County's failure to adopt rules and regulations under the PRA. Pierce County believes that the only appropriate remedy for such a violation is an injunction, but it cites only an unpublished case for this proposition.

The Plaintiff cites two cases for the proposition that the PRA is violated if an agency does not adopt or enforce rules under RCW 42.56.100 – *Kleven v. Des Moines*, 111 Wn. App. 284, 296-97 (2002); and *ACLU v. Blaine School Dist.*, 86 Wn. App. 688, 695 (1997). Those cases are

inapposite. The record in *Klevin* contained no information to show that the City had not adopted or enforced rules and regulations, and so the Court of Appeals did not address that issue. Further, *ACLU* involves a case in which a school district refused to mail documents to a requestor who was located over 100 miles away. That refusal had a practical effect of making it very difficult or impossible to obtain the responsive documents. That has not been demonstrated here, although some inconvenience and extra expense is alleged.

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. This is particularly true under the facts of this case, in which documents are in fact being transmitted electronically now.

Further, the very facts of this case demonstrate why electronic submission of documents under the PRA can be problematic. In the middle of responding to this request, the original records officer retired and another records officer took over the project. The requestor continued to send emails to the first records officer's work email address, which was inactive. The messages did not get to the correct person. Electronic communications regarding PRA requests and responses are not necessarily more reliable or convenient than using the U.S. mail.

3. Applicability of Exemption

The next issue is whether the exemption cited is legally appropriate. This Court finds that it was.

Pierce County argues that this Court should not address this issue because it is premature to do so. The documents responsive to the request have not all been provided yet, as ongoing responsive batches are forthcoming. In *Hobbs v. State*, the Court of Appeals held that a PRA lawsuit was premature when it was filed after the first installment, but when future installments were still outstanding. 183 Wn. App. 925, 936-37 (2014). In that case, the Court held that there was no "final agency action" because the Plaintiff's request was not denied. This lawsuit is different. Pierce County has denied inspection of multiple records or portions of records and provided exemption logs. The agency takes a clear position that the exemptions are justified and the withheld documents will not be produced. This lawsuit is in response to final agency action, and it is not premature.

This Court is not addressing any agency action or decisions made regarding installments produced after the initiation of this litigation.

The agency bears the burden "to establish that refusal to permit public inspection and copying in accordance with a statute that exempts or prohibits disclosure." RCW 42.56.550(1). However, it is the Plaintiff's burden to prove the elements necessary to recovery. *Adams v. Washington State Dept. of Corrections*, 189 Wn. App. 925, 952 (2015).

The issue here is whether the documents are subject to disclosure in light of the attorney work product privilege and the common interest doctrine. Generally, a party waives the attorney work product privilege if that party discloses documents to other persons with the intention that an adversary can see the documents. *Limstrom v. Ladenburg*, 110 Wn. App. 133, 145 (2002).

"The 'common interest' doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group." *Sanders v. State*, 169 Wn.2d 827, 853 (2010). "The common interest doctrine is an exception to the general rule that the voluntary disclosure of a privileged attorney client or work product communication to a third party waives the privilege." *Kittitas Co. v. Allphin*, 195 Wn.App. 355, 368 (2016), *review granted in part*, 187 Wn.2d 1001 (2017).

The records at issue in this case are numerous, consisting of over 9,000 pages. Many records were not disclosed, citing the work product privilege. The Plaintiff alleges in a generic way that the work product privilege does not apply because some or all of the documents were shared outside of the attorney-client relationship. Pierce County responds that sharing of any of those documents does not destroy the work product privilege because the common interest doctrine applies.

Specifically, the Plaintiff alleges that giving documents to Lindquist and to the Washington Association of Prosecuting Attorneys and the Washington State Association of Municipal Attorneys, two amici in the *Nissen* litigation,[1] destroyed the work product privilege. Pierce County argues that Lindquist and the associations were acting as joint defendants in the *Nissen* case, which may be implied from conduct. *See Allphin*, 195 Wn. App. at 359 (holding that no formal or written agreement is required for a common interest to arise); *United States v. Gonzales*, 669 F.3d 974, 979 (9th Cir. 2012) (holding that common interest can be implied from conduct and situation).

Pierce County has met its burden to establish that a PRA exemption (work product privilege) applies to these documents. It is not disputed that the work product privilege applies to these documents in a general sense. Further, and significantly, the Plaintiff has failed to even identify which specific records are at issue that purportedly lost their work product privilege because they were shared. Additionally, this Court finds that there was a common interest between Pierce County, its elected Prosecutor Lindquist, and the amici that received the documents in the context of the *Nissen* litigation.

The final argument by the Plaintiff on this issue is that a conflict of interest destroys the common interest doctrine. The Plaintiff explains that no court has made such a legal ruling. This Court declines to issue a new statement of law, especially when the record is insufficiently developed to do so.

4. Adequacy of Exemption Logs

Finally, the Plaintiff asserts that the exemption logs are inadequate because they lack the specificity that Plaintiff asserts is required. This Court holds that they were adequate.

An agency that withholds or redacts a record under the PRA must "include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation

[1] *Nissen v. Pierce County*, Thurston County Superior Court Cause No. 11-2-02312-2; *Nissen v. Pierce County*, 183 Wn.2d 863 (2015).

of how the exemption applies to the record withheld." RCW 42.56.210(3). The Plaintiff takes issue with the specificity of the exemption logs, which state repeatedly:

> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product – Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.

Defendant's Brief and Declarations, Vol. 2, Ex. 34. The Plaintiff believes that the common interest doctrine should have been specifically invoked in the exemption logs.

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.

In short, this Court rules in favor of Pierce County on the merits of this case. The merits hearing did not involve a challenge to any particular document withheld or redacted. In the event that there are issues identified by the parties in their Joint Statement filed on November 17, 2016, that remain unresolved, the Plaintiff shall set a PRA scheduling conference after conferring with Defendant's counsel.

The parties may present an order based on this Court's ruling by scheduling it for presentation on a civil motion calendar.

Sincerely,

Carol Murphy

Carol Murphy
Superior Court Judge

cc: Court File

APPENDIX C

Neutral
As of: April 12, 2018 11:13 PM Z

West v. Bacon

Court of Appeals of Washington, Division Two

December 19, 2017, Filed

No. 49207-5-II

Reporter
2017 Wash. App. LEXIS 2880 *; 2017 WL 6492709

ARTHUR WEST, *Appellant*, v. CONNIE BACON ET AL., *Respondents*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *West v. Bacon, 2017 Wash. App. LEXIS 2969 (Wash. Ct. App., Dec. 19, 2017)*

Prior History: [*1] Appeal from Pierce County Superior Court. Docket No: 09-2-14216-1. Judge signing: Honorable David Edward - Judge Pro Tem. Judgment or order under review. Date filed: 05/16/2016.

West v. Bacon, 180 Wn. App. 1047, 2014 Wash. App. LEXIS 1190 (Apr. 28, 2014)

Counsel: Arthur West, Appellant, Appearing Pro se, Olympia, WA.

For Respondent: Carolyn A. Lake, Goodstein Law Group PLLC, Tacoma, WA.

Judges: Authored by Linda Lee. Concurring: Rich Melnick, Jill Johanson.

Opinion by: Linda Lee

Opinion

¶1 LEE, J.— Arthur West appeals the superior court's dismissal of his October 2009 lawsuit against the Port of Tacoma for alleged Public Records Act (PRA) violations from an August 2009 PRA request. The superior court dismissed the suit pursuant to our holding in *Hobbs v. State, 183 Wn. App. 925, 335 P.3d 1004 (2014)*. West argues that the superior court erred in (1) dismissing his suit against the Port of Tacoma, (2) vacating its order granting West's motion for a show cause order and allowing amendment of his complaint, and (3) changing the venue to Grays Harbor County Superior Court.

¶2 We hold that the superior court did not err in dismissing West's suit because West filed his suit prematurely pursuant to *Hobbs*. We also hold that West's other claims fail and that the Port is entitled to an award of fees and costs on appeal. Accordingly, we affirm.

FACTS

¶3 On August 14, 2009, West [*2] filed a public records request with the Port seeking:

> 1. All physical copies of [South Sound Logistics Center (SSLC)] related or other records presently being withheld by the Port or its agents from any person or entity, including the allegedly "newly disclosed" October Surprise SSLC records which continue to be illegally withheld.
> 2. All billing statements, invoices, and communications 2006 to present involving or about Ramsey Ramerman, Foster Pepper, or other counsel providing advice or services in regard to Public Disclosure issues.
> 3. All billing statements, invoices, or communications 2004 to present with or concerning "Judge" Terry Lukens or Judge Flemming [sic].
> 4. All communications with friends of Rocky Prairie or their representatives 2007 to present, to include any denials of requests for disclosure and any "privilege" logs.

Resp't Clerk's Papers (CP) at 36.

¶4 On August 19, the Port responded to West's request and advised him that because of "the broad scope of [his] entire request and the large volume of potentially responsive records, the Port estimated that additional time was required to gather, review records and respond. [The Port] estimated [it] could respond to [West's] [*3] request on or before August 31, 2009." Resp't CP at 36.

¶5 On September 3, "the Port extended its estimated response

date to on or before September 25, 2009." Resp't CP at 36. Before that deadline, the Port revised its estimate to October 6, 2009.

¶6 On October 6, the Port updated its response date to October 14, 2009. Also on October 6, West filed suit against the Port alleging a violation of the PRA. West included in his suit a cause of action alleged in a different suit he filed against the Port for violating the PRA. On October 14, the Port sent a letter to West detailing its response to each of his requests and a privilege log for records it deemed exempt.[1]

¶7 On November 2, the Pierce County Superior Court judge assigned to the case recused herself. On January 27, 2010, the Pierce County Superior Court Administrator assigned the case to a visiting judge from Grays Harbor County Superior Court (hereinafter superior court).

¶8 On May 8, West sent an e-mail to the Port advising that he intended to note a hearing for May 10 on his motion for a show cause order and for leave to amend his complaint. The motion requested that the Port appear and show cause why it should not be found in violation of [*4] the PRA. West was aware that the Port's counsel was unavailable from May 4 to May 17.

¶9 On May 10, the Port filed a response objecting to a hearing on that day because the motion was not properly noted or confirmed. The Port also submitted a response brief opposing West's motion for a show cause order.

¶10 That same day, unaware that the Port had filed a response, the superior court held a hearing on West's motion to show cause. The Port did not attend the hearing and West did not advise the superior court of the Port's unavailability or response. On May 18, the superior court entered an order granting West's motion for a show cause order and allowing West leave to amend his complaint.

¶11 On May 21, the Port received notice about the superior court's order entered on May 18. The Port then filed a timely motion to reconsider and vacate the order. The Port also filed a motion to dismiss. West did not file any responsive pleadings to the Port's motions.

¶12 On June 18, the superior court held a hearing on the Port's motion to reconsider the show cause order entered on May 18. The superior court vacated the order to show cause and allow West to amend his complaint because West did not properly note or [*5] confirm his motion for the hearing for May 10,[2] knew but did not alert the court that the Port was unavailable on May 10, and the documents in the file were not file stamped until two days before the hearing.

¶13 On July 26, the superior court held a hearing on presentation of the order vacating the May 18 show cause order and on the Port's motion to dismiss. The Port argued that a portion of West's complaint was duplicative of another claim in a different public records lawsuit by West against the Port that was being litigated in the Pierce County Superior Court. West agreed that the first part of his complaint was duplicative and that the records sought in the other suit had largely been disclosed.

¶14 The superior court dismissed the first part of West's complaint. The superior court also imposed sanctions on West of $1,500, to be paid to the Port, for causing the Port to respond to the same litigation for a second time.

¶15 West interrupted the superior court during its ruling and continued to do so after being warned by the court. As a result, the superior court found West in contempt of court. The superior court then set a date for the parties to present an order in conformance with its rulings. [*6]

¶16 On August 2, the superior court held a hearing on the presentation of orders dismissing the first part of West's complaint, imposing sanctions on West, and finding West in contempt of court. West did not appear or respond. The superior court signed only the order of contempt, and set over the date for presentment of an order dismissing the first part of West's complaint and imposing sanctions to August 9. West did not appear at that hearing, and the superior court signed an order dismissing the first part of West's complaint, imposing $1,500 in sanctions payable to the Port, and conditioning further action by West in the case on payment of those sanctions.

¶17 From August 2010 to April 2012, West took no further action in this case. On April 16, 2012, West sent his sanctions payment to the Port.

¶18 On May 30, West filed a motion for a trial date and a new case scheduling order. Two days later, the Port filed a motion

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[1] On November 3, the Port informed West of 1,258 additional records that were responsive to his request, and on November 9, provided him with an updated privilege log for records the Port deemed exempt.

[2] The order assigning the case to the Grays Harbor visiting judge required that Pierce County Local Rules (PCLR) be followed for noting motions. PCLR 7(a)(3)(A) requires that all motions be noted, and the motion and supporting documents be filed and served, no later than the close of business six court days before the date set for the hearing. PCLR 7(a)(9) requires that all motions be confirmed by contacting the judicial assistant of the assigned judicial department no later than noon two court days prior to the hearing.

to dismiss.

¶19 On June 12, the superior court held a hearing on the Port's motion to dismiss for failure to prosecute and abuse of process. The superior court, relying on CR 41(b) and its inherent authority to dismiss, granted the Port's motion to dismiss because West disregarded the contempt [*7] order from the court and West's conduct had "substantially interfered with the efficient administration of justice." Verbatim Report of Proceedings (VRP) (June 12, 2012) at 43.

¶20 West appealed the dismissal, challenging the superior court's authority to dismiss based on CR 41(b)(1). On April 28, 2014, Division One of this court reversed and ordered that the merits of West's claim be remanded for trial.

¶21 On February 5, 2016, the Port filed a motion to dismiss based on CR 12(b) and CR 56. The Port argued that West "prematurely filed his public records lawsuit prior to the Port completing its final agency response action" and that under *Hobbs*,[3] West failed to state a claim upon which relief could be granted. Appellant CP at 573. West responded by arguing that because the appellate court ordered that the merits of his claim be remanded for trial, stare decisis applied, and the Port's motion was barred. West also argued that *Hobbs* did not apply and that the Port's motion was also barred by res judicata and collateral estoppel.

¶22 On April 1, the superior court held a hearing on the Port's motion to dismiss. The superior court found that *Hobbs* applied, that the PRA did not require an agency to comply with its own self-imposed deadlines as long as it was diligently responding to [*8] the request, and that no evidence was presented to show the Port was not diligent in responding to West's request. The superior court granted the Port's motion to dismiss.[4]

¶23 West appeals.

ANALYSIS

A. MOTION TO DISMISS

¶24 West argues that the superior court erred when it dismissed his suit against the Port of Tacoma on May 16, 2016. We disagree.

1. Legal Principles

¶25 We review PRA cases de novo. *Nissen v. Pierce County, 183 Wn.2d 863, 872, 357 P.3d 45 (2015)*. We also review dismissals under CR 12(b)(6) de novo. *Worthington v. Westnet, 182 Wn.2d 500, 506, 341 P.3d 995 (2015)*. Dismissals under CR 12(b)(6) are proper "only where there is not only an absence of facts set out in the complaint to support a claim of relief, but there is no hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim." *Id. at 505*.

¶26 If a party brings a motion to dismiss under CR 12(b)(6), but "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [CR] 56." CR 12(b). Affidavits submitted in a CR 12(b)(6) motion are "matters outside the pleadings" that convert the CR 12(b)(6) motion into a CR 56 summary judgment motion. *Lobak Partitions, Inc. v. Atlas Constr. Co., 50 Wn. App. 493, 503, 749 P.2d 716, review denied, 110 Wn.2d 1025 (1988)*.

¶27 We review a superior court's decision on summary judgment de novo. *Didlake v. State, 186 Wn. App. 417, 422, 345 P.3d 43, review denied, 184 Wn.2d 1009 (2015)*. Summary judgment is appropriate if there are [*9] no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

¶28 Here, the superior court considered facts beyond those stated in West's complaint. Therefore, because a motion to dismiss for failure to state a claim is treated as a motion for summary judgment when matters outside the pleadings are considered, we treat the superior court's dismissal of West's suit as a decision on a motion for summary judgment. *Kelley v. Pierce County, 179 Wn. App. 566, 573, 319 P.3d 74, review denied, 180 Wn.2d 1019 (2014)*.

2. *Hobbs v. State*

¶29 In *Hobbs*, we addressed the issue of whether a public records requester is allowed to initiate a lawsuit before an agency denies or closes the request. *183 Wn. App. at 935*. Hobbs argued that "a requester is permitted to initiate a lawsuit *prior* to an agency's denial and closure of a public records request." *Id.* We rejected Hobbs's argument and held, "Under the PRA, a requester may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a record," and, though not specifically defined, "a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records." *Id. at 935-36*. We concluded that the plain language of the [*10] PRA dictated that "being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA." *Id. at 936*. Accordingly, we held that the superior court did not err in dismissing Hobbs's PRA suit. *Id. at 946*.

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[3] *Hobbs, 183 Wn. App. 925, 335 P.3d 1004*.

[4] The superior court's order of dismissal was filed on May 16, 2016.

3. Application of *Hobbs*

¶30 Here, West made his public records request on August 14, 2009. Like in *Hobbs*, the Port replied to West's request within the five-day statutory period and provided West with an anticipated response date of the end of the month. However, the Port was unable to meet that deadline due to "the broad scope of [his] entire request and the large volume of potentially responsive records" and had to extend the estimated date of production. Resp't CP at 36. And like in *Hobbs*, the Port maintained active communication with West about his request. The Port sent a letter to West on October 14 detailing its response to each of West's requests. But West had already filed his suit on October 6.

¶31 We reach the same conclusion we reached in *Hobbs*—that West's suit against the Port was premature under the plain language of the PRA because the Port had not "engaged in some final action denying access to a record" at the time West filed the suit, and [*11] "being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA." *Id. at 935-36*.

4. West's Arguments

a. Distinguishing *Hobbs*

¶32 West argues that the facts in *Hobbs* are distinguishable from the facts of this case. We disagree.

¶33 West argues that, unlike *Hobbs*, the Port was not in the process of producing records when he filed suit. However, while the record shows that the Port had not produced a first installment as the Auditor did when Hobbs filed suit, the record does show that the Port was not ignoring West's request.

¶34 On August 19, within five days of receiving the request, the Port advised West that because the scope of his request was "broad" and that there were a "large volume of potentially responsive records" that required "additional time ... to gather, review records and respond," the Port needed until August 31 to respond. Resp't CP at 36. Although the Port could not meet the August 31 self-imposed deadline, the Port provided West with constant updates, including its last update on October 6, which stated that it estimated a response by October 14.[5] The Port provided a detailed response to West's request on October 14. West does not [*12] provide any evidence to support an inference that the Port was not diligent in its efforts to fulfill his request and that the postponement of the response date was not in good faith.

¶35 West notes that the *Hobbs* court included a footnote stating that it did "not address the situation where an agency completely ignores a records request for an extended period." *Id. at 937 n.6*. However, the record fails to support the claim that the Port "completely ignored" West's request for an extended period of time. Therefore, the fact that the Port did not produce records before West filed suit does not render the legal principles in *Hobbs* inapplicable.

¶36 Second, West attempts to distinguish *Hobbs* by arguing that he asserted his cause of action under *RCW 42.56.550(2)*.[6] But West fails to provide any citation to the record or to legal authority for his argument. *RAP 10.3(a)(6)*. West only cites to a brief filed by the attorney general for support. Briefs are not legal authority. *See RAP 10.3(a)(6)*.

¶37 Regardless, West did not assert a cause of action under *RCW 42.56.550(2)* or seek the relief provided by that statute. *RCW 42.56.550(2)* states:

> Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to [*13] respond to a public record request, ... the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

¶38 West's complaint did not identify *RCW 42.56.550(2)* as the basis for his cause of action, nor did it seek to have the superior court "require the responsible agency to show that the estimate it provided [wa]s reasonable." *RCW 42.56.550(2)*. Instead, West's asserted cause of action under the PRA was, "By their acts and omissions, the Port of Tacoma and its agents violated the Public Records Act, *RCW 42.56*." Appellant CP at 186. The relief West requested was "[t]hat plaintiff be awarded per diem penalties for each day each public record has been unlawfully withheld in regard to his August 14, 2009 request, and for each day of the Port's pattern of unreasonably delaying disclosure, and that plaintiff recover his costs and fees." Appellant CP at 187. This is not relief provided under *RCW 42.56.550(2)*, but is instead relief provided under *RCW 42.56.550(4)*. Therefore, West's

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[5] "An agency does not violate the PRA merely by failing to meet its own self-imposed deadlines as long as it was acting diligently in its attempts to respond to the PRA request." ***Hikel v. City of Lynnwood, 197 Wn. App. 366, 377, 389 P.3d 677 (2016).***

[6] West's argument that this court previously recognized his claim was under *RCW 42.56.550(2)* is misleading and factually meritless. West cites a passage from a case in this court that involved a different request for records that he previously submitted in 2007. ***See West v. Port of Tacoma, noted at 179 Wn. App. 1034 (2014).***

argument that he asserted a cause of action under RCW 42.56.550(2) fails.

¶39 Even if we view West's request for relief as a request under [*14] RCW 42.56.550(2), West's claim fails. Nothing in the record shows that the Port provided an unreasonable estimate of time for responding to West's request. West made his records request on August 14. The Port initially estimated that it would be able to respond to West's request by the end of August. The Port then extended its estimated response date three times and ultimately provided a final estimated response date of October 14. But RCW 42.56.520 "does not limit the number of extensions an agency may require to respond to a request." *Andrews v. Wash. State Patrol, 183 Wn. App. 644, 652, 334 P.3d 94 (2014), review denied, 182 Wn.2d 1011 (2015).* The two-month time frame was reasonable as the record shows that the Port viewed the request as broad in scope and potentially involved a large number of responsive documents. The record also shows that there was a large volume of potentially responsive records to go through, the request included records subject to the attorney-client privilege, the Port initially found 587 responsive records, the Port subsequently informed West of an additional 1,258 records that were responsive to the request, and the Port provided him with privilege logs for records deemed exempt.

b. *Hobbs* Holding is Dicta

¶40 West next argues, "In [*Hobbs*], the Court actually reached the merits [*15] of Hobbs'[s] claims, and found no violation, making the portions of their ruling on the timing of Hobbs suit obiter dictum inapplicable to cases where an actual violation of the PRA is present." Br. of Appellant at 31. We disagree.

¶41 "Obiter dictum" is "'[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).'" *Pierce County v. State, 150 Wn.2d 422, 435 n.8, 78 P.3d 640 (2003)* (quoting BLACK'S LAW DICTIONARY 1100 (7th ed. 1999)). "Obiter dictum" is generally abbreviated to "dicta." *State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 89, 273 P.2d 464 (1954).* Alternative holdings are not dicta, but are instead binding precedent. *See e.g., Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1255-56 (11th Cir. 2017)* (citing, among others, *Hitchcock v. Sec'y, Florida Dep't of Corr., 745 F.3d 476 (11th Cir. 2014)* for the proposition that "[A]n alternative holding is not dicta but instead is binding precedent.").

¶42 Here, the first issue considered in *Hobbs* was whether "a requester is permitted to initiate a lawsuit *prior* to an agency's denial and closure of a public records request." *183 Wn. App. at 935.* On that issue, *Hobbs* held that "before a requester initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Id. at 936.* Thus, the requirement that, "there must [*16] be some agency action, or inaction, indicating that the agency will not be providing responsive records" before a PRA suit could be filed, was the primary issue decided in *Hobbs. Id.* And to the extent *Hobbs* provided further holdings for why the superior court did not err, they would be alternative holdings and binding precedent.

c. Retroactive application of *Hobbs*

¶43 West also argues that *Hobbs* should not be applied retroactively. However, the superior court did not retroactively apply *Hobbs. Hobbs* was decided before the superior court considered the Port's motion to dismiss on remand. Furthermore, when "a case is appealed after being remanded by the appellate court, the court may apply the law in effect at the time of the second appeal in reaching its decision." *Roberson v. Perez, 119 Wn. App. 928, 933, 83 P.3d 1026 (2004), aff'd, 156 Wn.2d 33, 123 P.3d 844 (2005).* Thus, we may nonetheless apply the legal principles set forth in *Hobbs* in this appeal. Therefore, West's argument fails.

d. Prior appellate court order and stare decisis

¶44 West next argues that the superior court was required to reach the merits of his claim because Division One of this court ordered a remand of the case for trial on the merits on a prior appeal.[7] We disagree.

¶45 West's argument is not persuasive because Division [*17] One's opinion considered only whether dismissal was proper under CR 41(b) and not CR 12(b)(6) or CR 56(c). *See West v. Bacon, No. 71366-3-I, slip op. at 4-5, 2014 Wash. App. LEXIS 1074 (Wash. Ct. App. Apr. 28, 2014)* (unpublished), http://www.courts.wa.gov/opinions/pdf/713363.pdf . The superior court had previously dismissed West's suit relying on CR 41(b) and its inherent authority to dismiss because West

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[7] West also makes an argument based on stare decisis and res judicata. But West does not provide any legal authority for his argument on res judicata, and thus, we do not consider it. RAP 10.3(a)(6); ***Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).*** Also, West's argument based on stare decisis is misplaced. Stare decisis means that "'the rule laid down in any particular case is applicable only to the facts in that particular case or to another case involving identical or substantially similar facts.'" ***Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd., 172 Wn.2d 144, 173, 256 P.3d 1193 (2011)*** (quoting ***Floyd v. Dep't of Labor & Indus., 44 Wn.2d 560, 565, 269 P.2d 563 (1954)).*** The prior appellate court order is not an established rule to be applied here. Therefore, this argument fails.

disregarded the contempt order from the court and West's conduct had "substantially interfered with the efficient administration of justice." VRP (June 12, 2012) at 43. On appeal, Division One reversed and ordered the merits of West's claim to be remanded for trial. *Id. at 10, 2014 Wash. App. LEXIS 1074*.

¶46 Division One's remand in 2014 does not change the necessary conclusion dictated by *Hobbs* because Division One only considered whether the superior court abused its discretion in granting a dismissal under *CR 41(b)*. Thus, Division One's decision in the previous appeal has no bearing on the issues before this court in the current appeal, which concerns whether West prematurely filed suit.

e. Citation to other cases

¶47 West argues that *Violante v. King County Fire District No. 20, 114 Wn. App. 565, 59 P.3d 109 (2002)*; *West v. Department of Natural Resources, 163 Wn. App. 235, 258 P.3d 78 (2011), review denied, 173 Wn.2d 1020 (2012)*; and *Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004)*, allowed him to bring a PRA action before his request was completed, in part because it was necessary to get the Port to respond. However, the cases West relies on are not persuasive. *West* ***[*18]*** and *Hangartner* did not address the issue of whether suit was prematurely filed. And *Violante* only addressed whether the suit was necessary when the public agency failed to respond to four PRA requests for the same information. *114 Wn. App. at 570-71*.

¶48 West also argues that we should follow *International Longshore & Warehouse Union v. Port of Portland, 285 Or. App. 222, 396 P.3d 235, review denied, 362 Or. 39 (2017)*, and hold that the superior court improperly dismissed the case because a "denial" of a records request is not necessary for a court to have jurisdiction over a case under public records law. However, the court in *International Longshore* interpreted an Oregon public records statute that allowed the court to enjoin a public body from withholding records, which is distinct from the Washington statute at issue here, which allows a requester to motion the court to require a public agency to show why it failed to disclose records or why its estimated disclosure time was reasonable. *See ORS 192.490(1)*; *see also RCW 42.56.550*. Furthermore, precedent from other jurisdictions does not control our decisions. *Casterline v. Roberts, 168 Wn. App. 376, 385, 284 P.3d 743 (2012)*; *Charlton v. Toys "R" Us—Delaware, Inc., 158 Wn. App. 906, 916 n.1, 246 P.3d 199 (2010)*. Therefore, we do not follow *International Longshore*.[8]

f. Constitutional arguments

¶49 West argues that applying the legal principle from *Hobbs* would violate the separation of powers, intent of **[*19]** the PRA, prohibition on ex post facto laws, and due process. However, we do not consider these claims as West merely claims such violations exist and cites to cases for the rules, but does not provide further argument.[9] Therefore, we do not consider these arguments further. *RAP 10.3(a)(6)*; *Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)* (holding that where arguments are not supported by authority, this court does not consider them).

g. Jurisdictional arguments

¶50 West makes several arguments regarding the superior court's jurisdiction over this case based on res judicata, collateral estoppel, equitable estoppel, and waiver. Regarding his claim under res judicata, West does not provide any applicable legal authority for support, and thus, we decline to address this claim. *RAP 10.3(a)(6)*; *Cowiche Canyon, 118 Wn.2d at 809*. And for his claims under estoppel and waiver, West asserts that the Port waived the defense of jurisdiction and estopped itself from claiming otherwise because it sought affirmative relief. However, the Port did not seek any such relief. Therefore, these claims fail.[10]

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[8] To the extent West cites to *Hikel, 197 Wn. App. 366, 389 P.3d 677*, and *Cedar Grove Composting, Inc. v. City of Marysville, 188 Wn. App. 695, 354 P.3d 249 (2015)*, to support his assertion that he had a cause of action under *RCW 42.56.550*, this argument is not persuasive. The court in *Hikel* only addressed whether the city provided a reasonable estimate for completion of a records request, whether notification of a completed request was necessary, whether the city acted diligently and reasonably, and what remedy was available for a violation. *See 197 Wn. App. at 372-79*. And the court in *Cedar Grove* only addressed whether a non-requesting party had standing to sue under the PRA, prelitigation production by the city negated penalties, certain documents were subject to the PRA, and the court abused its discretion in assessing penalties and fees. *See 188 Wn. App. at 710-24*. These cases did not address whether a party prematurely filed suit under the PRA.

[9] The cases cited by West are also inapplicable. The cases deal with the constitutionality of a coroner's inquest statute (***Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994)***), retroactive application of a verdict reformation statute (*Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)*), application of an amended parole statute (*Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995)*), application of an amended statute on the certificate requirements for re-entry into the country (*Chew Heong v. U.S., 112 U.S. 536, 5 S. Ct. 255, 28 L. Ed. 770 (1884)*), and retroactive expansion of statutory language in a criminal trespass case (*Boule v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)*).

[10] West apparently argues against the imposition of sanctions in this case under *CR 11* and that the clean hands doctrine bars the relief

B. VACATING ORDER

¶51 West argues that the superior court erred when it vacated its order for a show cause hearing and allowing amendment.[11] We disagree.

¶52 Under CR 59(a), on the motion of the aggrieved party, a decision or order of [*20] the superior court may be vacated and reconsideration granted. Such relief may be granted based on an irregularity in the court proceeding or order, misconduct of the prevailing party, accident or surprise that ordinary prudence could not have guarded against, and when substantial justice has not been done. CR 59(a)(1), (2), (3), (9).

¶53 Under Pierce County Local Rule (PCLR) 7(a)(3)(A), motions are scheduled for hearing by filing a note for motion docket. The note must be "filed with the motion and supporting documents and served upon the opposing party at the same time." PCLR 7(a)(3)(A). The note, motion, and supporting documents must be filed with the court clerk, and served on the other party "no later than the close of business on the sixth court day before the day set for hearing." PCLR 7(a)(3)(A). Also, all motions must be confirmed by contacting the judicial assistant of the assigned judicial department by noon two court days before the hearing. PCLR 7(a)(9).

¶54 We review a superior court's ruling on a motion to reconsider and motion to vacate under CR 59 for an abuse of discretion. *Landon v. Home Depot, 191 Wn. App. 635, 639, 365 P.3d 752 (2015), review denied, 185 Wn.2d 1030 (2016); Meridian Minerals Co. v. King County, 61 Wn. App. 195, 203, 810 P.2d 31, review denied, 117 Wn.2d 1017 (1991).* A trial court abuses its discretion when its decision is manifestly unreasonable, based [*21] on untenable grounds, or made for untenable reasons. *Landon, 191 Wn. App. at 640.*

¶55 Here, the superior court vacated its previous order to show cause and to allow West to amend his complaint because West did not properly note or confirm the hearing for May 10, knew and did not alert the court that the Port was unavailable on May 10, and the documents in the file were not file stamped until two days before the hearing.[12] The superior court concluded that the Port presented good cause to support its motion to vacate and West did not respond to the Port's motion.

¶56 While West was not required to alert the superior court that the Port was unavailable, PCLR 7 specifically requires that the note, motion, and supporting documents must also be filed with the court clerk, and served on the other party "no later than the close of business on the sixth court day before the day set for hearing." PCLR 7(a)(3)(A). However, West did not note the hearing for May 10 and did not file the note and supporting documents until two days before the hearing. And the record does not show that West had confirmed the hearing. West's failure to properly follow the rules prevented the Port from receiving proper notice of the hearing and provided [*22] a basis for the superior court to vacate its previous order. Thus, we hold that the superior court did not abuse its discretion when it vacated its order for a show cause hearing and allowing amendment.[13]

D. CHANGE OF VENUE

¶57 West next argues that the superior court erred by changing the venue and appointing a visiting judge. This claim is factually meritless.

¶58 Under RCW 4.12.030, a court may change the venue for trial when motioned on several bases, including improper county designation, lack of impartiality, convenience, and judge disqualification. And under RCW 2.08.150, judges from one county may request that a visiting judge from another county be appointed. There is no requirement that this request must be on the record, and "[a] superior court, as a court of general jurisdiction, is presumed to act within its authority

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sought by the Port. However, the Port does not request any sanctions under CR 11. West also raises this claim for the first time in his reply brief and fails to present any applicable legal authority for his clean hands argument. Therefore, we do not address these claims. RAP 10.3(a)(6); ***Cowiche Canyon, 118 Wn.2d at 809.***

[11] West also argues that the superior court violated the appearance of fairness and the ***Fifth Amendment*** by refusing to conduct a show cause hearing. However, this claim is factually meritless. The superior court did not refuse to conduct a show cause hearing, but merely vacated its order for a show cause hearing after considering the Port's motions for reconsideration and to vacate. West did not make a subsequent motion for a show cause hearing. Furthermore, West does not provide any legal argument or authority based on the appearance of fairness or the ***Fifth Amendment.*** Therefore, we do not consider these arguments. RAP 10.3(a)(6); ***Cowiche Canyon, 118 Wn.2d at 809.***

[12] West does not challenge the superior court's findings, and thus, they are verities on appeal. *PacifiCorp v. Wash. Utils. & Transp. Comm'n, 194 Wn. App. 571, 587, 376 P.3d 389 (2016).*

[13] West also asserts that the superior court abused its discretion when it failed to "vacate its prior denial [of a show cause hearing and leave to amend his complaint] on May 16, 2016." Br. of Appellant at 38. However, West does not cite to any part of the record to show that he made a motion for such relief and a review of the record does not show that West requested a show cause hearing or leave to amend his complaint after the superior court vacated its initial order granting such relief. Therefore, we do not address this claim. RAP 10.3(a)(6); ***Cowiche Canyon, 118 Wn.2d at 809.***

absent an affirmative showing to the contrary." *State v. Hawkins, 164 Wn. App. 705, 712, 265 P.3d 185 (2011), review denied, 173 Wn.2d 1025 (2012).*

¶59 West argues that this case should not have been transferred to Grays Harbor County because it was not the proper county for this case, and thus, the superior court lacked jurisdiction. However, the venue of this case was not transferred to Grays Harbor County Superior Court. A visiting judge from Grays Harbor County was merely **[*23]** appointed and trial was still set to be held in Pierce County Superior Court. While West also argues that the court lacked a basis to appoint a visiting judge, West fails to show that the superior court acted beyond its authority under RCW 2.08.150. Thus, we hold that this claim fails.[14]

¶60 Furthermore, "[i]t is also the rule that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause." *Adamson v. Traylor, 66 Wn.2d 338, 339, 402 P.2d 499 (1965).* West could have presented this issue in his prior appeal, but failed to do so. Therefore, we decline to address this issue.

ATTORNEY FEES

¶61 Both parties request attorney fees and costs on appeal.[15] We award fees and costs to the Port and decline such an award to West.

¶62 West requests fees and costs under RAP 18.1 and RCW 42.56.550(4). Under RCW 42.56.550(4), a party prevailing against an agency in a PRA suit is entitled to an award of fees and costs. Because West does not prevail here, he is not entitled to fees and costs.

¶63 The Port also requests fees and costs under RAP 18.1, RAP 18.9, and RCW 4.84.185 for defending a frivolous appeal. Under RCW 4.84.185, an action is frivolous if, "considering the action in its entirety, it cannot **[*24]** be supported by any rational argument based in fact or law." *Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 785, 275 P.3d 339, review denied, 175 Wn.2d 1008 (2012).* Under RAP 18.9, an appeal is frivolous if it is so devoid of merit that there exists no reasonable possibility of reversal. *In re Marriage of Healy, 35 Wn. App. 402, 406, 667 P.2d 114, review denied, 100 Wn.2d 1023 (1983).* Because West's appeal did not present debatable issues on which there was a reasonable possibility of reversal, we exercise our discretion and award attorney fees and costs to the Port.

¶64 We affirm.

¶65 A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

JOHANSON, A.C.J., and MELNICK, J., concur.

End of Document

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[14] West also argues that the superior court denied him an opportunity to be heard and improperly sanctioned him for $1,500, which violated the ***Fifth*** and ***Fourteenth Amendments.*** However, West failed to raise these arguments in his opening brief, so we decline to address them. ***Cowiche Canyon, 118 Wn.2d at 809.***

[15] West also raises an additional argument in his reply brief on the duplicity of awarding fees in this case. However, we do not address arguments raised for the first time in a reply. ***Cowiche Canyon, 118 Wn.2d at 809.***

APPENDIX D

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As of: April 12, 2018 11:18 PM Z

West v. Port of Tacoma

Court of Appeals of Washington, Division Two

June 20, 2017, Filed

No. 48110-3-II

Reporter
2017 Wash. App. LEXIS 1473 *; 2017 WL 2645665

ARTHUR WEST, *Appellant*, v. PORT OF TACOMA, *Respondent*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *West v. Port of Tacoma, 199 Wn. App. 1035, 2017 Wash. App. LEXIS 1502 (Wash. Ct. App., June 20, 2017)*

Prior History: [*1] Appeal from Pierce County Superior Court. Docket No: 08-2-04312-1. Judge signing: Honorable Jerry T Costello. Judgment or order under review. Date filed: 11/20/2015.

West v. Port of Tacoma, 179 Wn. App. 1034, 2014 Wash. App. LEXIS 496 (Feb. 20, 2014)

Counsel: Arthur West, Appellant, Appearing Pro se, Olympia, WA.

For Respondent: Carolyn A. Lake, Goodstein Law Group PLLC, Tacoma, WA.

For Wa COAlition for Open Government, Amicus Curiae: William John Crittenden, Attorney at Law, Seattle, WA.

Judges: Authored by Linda Lee. Concurring: Lisa Sutton, Bradley Maxa.

Opinion by: Linda Lee

Opinion

¶1 LEE, J. — Arthur West appeals the superior court's dismissal of a suit he brought against the Port of Tacoma (the Port) in January 2008 that alleged Public Records Act (PRA) violations from a December 2007 PRA request. The superior court dismissed the case pursuant to our holding in *Hobbs v. State, 183 Wn. App. 925, 335 P.3d 1004 (2014)*. On appeal, West argues that the superior court err in dismissing his suit and in denying his motion to amend the complaint. Both parties argue they are entitled to an award of fees and costs.

¶2 We hold that *Hobbs* controls and the superior court did not err in dismissing West's suit. *183 Wn. App. at 936*. We do not consider whether the superior court erred in denying West's motion to amend because West did not appeal that order. Finally, we hold that the Port is entitled [*2] to an award of fees and costs on appeal. We affirm the superior court's order dismissing the suit.

FACTS

A. 2007-2008: PUBLIC RECORDS REQUEST IS MADE AND SUIT IS FILED

¶3 On December 4, 2007, West e-mailed a PRA[1] request to the Port. The executive director of the Port responded the same day, telling West that Andy Michels, risk manager for the Port, would be handling the request. West's PRA request said:

> Please regard this as a formal request for the following records under *RCW 42.56*.
> 1. All records and communications concerning the South Sound Logistics Center [(SSLC)], from January 1, 2005 to present.
> 2. All correspondence or communication with Diane Sontag.
> 3. Any records related to potential transport of Uranium Hexaflouride [sic] through Thurston County or the SSLC.
> Thank you for your consideration.

Clerk's Papers (CP) at 503.

¶4 On December 6, Michels advised West "that the Port was gathering documents and that the Port expected it would be

[1] Ch. 42.46 RCW.

December 21 before they would be available." CP at 498.[2]

¶5 On December 21, Michels sent West the following e-mail:

> I anticipated sending you computer disks of SSLC documents today to respond to your request. Due to the volume of documents I encountered unexpected difficulties in loading the documents to [*3] disks. I am continuing to work this problem and expect to respond with an initial set of documents shortly. Rather than wait for complete collection and review, I anticipate multiple distributions to you given the number of documents and the time required to review.

CP at 504.

¶6 On December 26, West requested information about the Port's privilege log.[3] Michels and West communicated twice more that day.

¶7 On December 31, Michels e-mailed West:

> This acknowledges your Public Record request and confirms the Port's prior communications to you in response. Please know that due to [the] broad scope of your request and the large volume of records which may be responsive, the Port will require additional time to gather, review records and respond. We expect to respond to your request on or before January 10th, 2008.

CP at 505. The Port assigned an additional employee to the production of the records responsive to West's request. That additional employee spent five to six hours per day gathering, reviewing, and processing the records.

¶8 On January 2, 2008, the Port hired Sound Legal Technologies, a data production firm to download the files of responsive records, organize the files in chronological order, and number the [*4] records for tracking. Sound Legal Technologies had trouble accessing the Port's server.

¶9 On January 10, the Port's attorney, Carolyn Lake, sent West an e-mail[4] stating:

> On behalf of the Port of Tacoma, we again acknowledge your Public Record request and we follow up on the Port's prior communications to you in response. Please know that due to [the] broad scope of your request and the large volume of records which may be responsive, the Port will require additional time to gather, review records and respond.
>
> Originally, we expect [sic] to respond to your request on or before January 10th, 2008. However, the Port needs additional time to respond. We will respond incrementally as sets of responsive records are gathered, reviewed and are available for release. We currently expect to release the first batch of responsive records on or before January 17, 2007.
>
> Please contact myself [sic] or Andy Michels at the Port if you have any question regarding this matter. Thank you.

CP at 506. Michels sent West an e-mail the next morning, January 11, that reiterated:

> Mr. West - I know that Ms[.] Lake sent you an email last night acknowledging that due to the volume of documents the Port will need additional time [*5] to respond to your request. I want to affirm her comments with this email.
>
> We currently expect to release the first batch of responsive records on or before January 17, 2007.
>
> Please contact me if you have any question regarding this matter. Thank you.

CP at 507.

¶10 On January 14, West filed this suit against the Port. The suit alleged the Port had refused to comply with the PRA and had acted in bad faith. West's causes of action stated that the Port (1) "illegally and unconstitutionally violated *RCW 42.56*," (2) "created a cause of action for [d]eclaratory relief," (3) was negligent, and (4) potentially violated the "Harbor improvement Act." CP at 4.[5] The complaint requested relief in the form of "an order ... declaring that defendant Port of Tacoma violated the PRA and their self imposed [sic] duty of transparency, and compelling disclosure of all requested records, and assessing penalties and costs." CP at 5. West also filed a motion for a show cause hearing regarding "why the requested records should not be disclosed." CP at 1202.

¶11 On January 16, Sound Legal Technologies delivered a complete copy of the responsive documents to the Port. The next day, the Port told West that it expected to release the first batch of responsive records on or before [*6] January 24. Another e-mail notified West that the Port expected these

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[2] In his briefing, West states that there is no record of this communication, "so the [P]ort would have trouble establishing this at trial," but does not dispute that the communication took place. Br. of Appellant at 16. West also does not allege that the Port failed to respond to his request within the statutorily required five days.

[3] West asserts in his briefing that these communications happened and Michels asserts in his declaration that they happened. However, none of these communications are found in the record.

[4] This e-mail was sent at 8:38 PM on January 10.

[5] West does not present any argument in his briefing regarding the superior court's dismissal of the causes of action he lists in paragraphs 4.2-4.4 of his complaint. Accordingly, we do not address them. *RAP 10.3(a)(6)*; ***West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012)*** (declining to consider issues that were not argued in the briefing).

records would be available on January 28.

¶12 By January 22, the Port had gathered 47 volumes of responsive records, with each volume contained within a 3-inch binder. Of those 47 volumes, 19 consisted of "various documents," totaling 8,602 pages, and 28 volumes consisted of e-mails, totaling 10,336 pages.

¶13 On January 29, West reviewed the first set of records that the Port produced. West identified some of the records at the time as ones he would like to copy.

¶14 On February 8, the Port responded to the suit. The Port argued that the suit filing was premature because the Port was responding to West's public records request.

¶15 On February 11, the Port transmitted to West a privilege log pertaining to the first 15 of 47 volumes of responsive records.

¶16 By March 26, the Port had made 13 volumes of records available for West to review. At that time, Michels stated that 18 additional volumes "will be shortly available, and 16 volumes are pending review by legal counsel and staff." CP at 545.

¶17 On March 28, West and the Port appeared in Pierce County Superior Court on West's motion for a show cause hearing. The superior court denied West's motion **[*7]** because it was premature. The superior court further ruled, and the Port agreed, that the public records and privilege logs for the volumes identified as "Final or Near Release" on an index attached to the order would be made available by April 15, 2008, and that the remainder of the records or privilege logs would be available by May 1, 2008.

¶18 On April 15, the Port notified West that the records identified in the court order were available. On Thursday, April 17, West asked if he could view the records on "Monday [April 21] or Tuesday at 11:00-4:00." CP at 610. The Port responded:

> Yes; the logs for each volume of records disclosed are all available for review at the same time as the records. Would you like us to go ahead and have your own copy of each log ready for your pick up?
>
> I'll also check with the Port about the logistics for your requested records review on either Monday or Tuesday from 11-4 PM, and get back with you shortly.

CP at 612-13.

¶19 The Port never followed up on the times West requested, and West did not respond until Friday, April 18, when he said he would like copies of each log if there were not electronic copies of the logs. The Port agreed to make the copies. At 6:38 PM that night, West told **[*8]** the Port via e-mail that "I will be at the Port at 9:00 Monday morning to inspect the records. I expect any exemptions to disclosure that the Port seeks to assert to be filed with the Court and sent to me by then." CP at 612.

¶20 West did not show up on Monday. Instead, West sent an e-mail at 11:53 AM that morning, April 21, saying,

> Since counsel has intervened in the process and determined to make inspection of the SSLC records as difficult as possible, please be advised that I will be reviewing the records this Tuesday-Thursday, between the Hours of 10:00 and 5:00.
>
> Please inform me if any further court orders will be necessary to insure this review.
>
> Certified copies of all requested records will be required, per objection of counsel to admission of any non-certified documents in court.

CP at 615.

¶21 West did not show up to review the records the Port had produced on Tuesday, April 22. West sent an e-mail the following day at 4:22 PM saying, "Due to what can only be described as your criminal conspiracy to deny access to evidence, and continuing refusal to confirm appointments in a timely manner, I will be appearing at the Port offices tomorrow at 11:00 to inspect and obtain records." CP at 616.

¶22 The Port responded,

> Thank **[*9]** you for writing to clarify your planned visit to the Port of Tacoma. Per your earlier emails, the Port of Tacoma has been prepared for your arrival and held records ready for your review in one of our conference rooms every day since 9:00 AM on Monday, April 21st. As you later revised your scheduled visit for Tuesday—Thursday of this week from 10: 00 AM—5: 00 PM, we have held space that space [sic] available for your used [sic] review and made available all of the currently released documents in that room for the entirety of your scheduled visits. Per your requested schedule, we will continue to make the space and those documents available tomorrow.
>
> Since I will be out of the office tomorrow morning, please ask for Mr. Tri Howard when you arrive.

CP at 617-18. Later that night, at 10:13 PM, West sent an e-mail stating that he was being subjected to an "unreasonable run-around," that the Port was refusing to comply with the March 28 order, that he wanted "complete electronic copies of all disclosed records and for copies of all exemptions claimed," and that, "If I am not notified by 8:00 tomorrow morning that these records will be immediately transmitted I will conclude that each of you is [sic] **[*10]** deliberately

obstructing access to them." CP at 617. West arrived after noon the next day to view the records, Thursday, April 24.

¶23 On May 1, the Port notified West that the next group of records and privilege logs were available for West to review. This group of disclosures consisted of 26 volumes of records, making a total of 51 volumes available for West's review. Those 51 volumes were made up of 6,870 records and 19,923 pages. The Port determined that 175 records were exempt and 97 records were released with redactions.

¶24 On May 2, a second show cause hearing was held on West's motion. The superior court denied West's requests to find the Port in contempt of the March 28 order and to join the Port of Olympia. The superior court also ordered the Port to provide West with the exemption logs.

¶25 On May 21, the Port provided the superior court with the withheld records for the superior court or a special master to perform an in-camera review. On May 30, the superior court ordered a special master be appointed.

¶26 On October 14, the Port filed updated privilege logs of withheld records with the court and provided copies for the special master. The Port reviewed the records that had been withheld when the [*11] Port decided to stop pursuing a particular cite for the SSLC. The Port determined that some of the previously withheld records could be disclosed. The Port notified West that new privilege logs and new records were released.

B. 2009: SPECIAL MASTER APPOINTED

¶27 On March 20, 2009, the superior court appointed a special master to review the records that were the subject of West's objection to the Port's disclosure. The special master completed the review on July 24. The special master identified four of the withheld documents that should be disclosed in full or in part, and affirmed the withholding of the remaining claimed exemptions. The Port moved to modify the special master's report, arguing that one of the documents identified by the special master for disclosure should not be disclosed.

C. 2011-2014: SUIT DISMISSAL AND REMAND

¶28 On January 25, 2011, the superior court granted the Port's motion to dismiss this suit under CR 41(b). *West v. Port of Tacoma*, No. 43004-5-II, slip op. at 5 (Wash. Ct. App. Feb. 20, 2014) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2043004-5-II%20%20Unpublished%20Opinion.pdf. West appealed that dismissal. West, No. 43004-5-II, slip op. at 5-7.

¶29 On February 20, 2014, we issued an unpublished opinion holding that the superior court erred in dismissing West's lawsuit. West, No. 43004-5-II, slip op. at 1. We reasoned that the superior [*12] court erred in dismissing the case under CR 41(b)(1) because the Port did not give West the requisite 10-days' notice, and erred in dismissing the case under CR 41(b)(2) because the superior court's letter did not meet the requirements for notice under CR 41(b)(2)(A). West, No. 43004-5-II, slip op. at 8-9. We further reasoned that the superior court's inherent authority did not permit it to dismiss a case because of West's dilatory behavior. West, No. 43004-5-II, slip op. at 12.[6] Accordingly, we vacated the order of dismissal and remanded the case for further proceedings to the superior court. West, No. 43004-5-II, slip op. at 1.

D. 2015: ON REMAND

¶30 On April 16, 2015, West moved for in-camera review of documents that the Port had not disclosed. The order denying the motion was filed on May 4.

¶31 The May 4 order concluded that the 2014 opinion by this court did not address the orders that the superior court had made concerning the PRA and, therefore, the motion for in-camera review was moot because the orders that the superior court made regarding the PRA issues remained the law of the case. The order also adopted the special master's report and set a hearing to hear the Port's motion to modify the report.

¶32 The same day, West filed a motion for a show cause hearing on PRA [*13] violations. The following day, on May 5, West sought discretionary review from this court of the May 4 order. On May 8, West moved the superior court to reconsider its May 4 order, and requested the judge to recuse himself from the case. On May 27, the superior court granted West's motion to reconsider, and denied his requests for recusal.

¶33 On June 2, West filed a motion to amend his complaint. The superior court denied the motion to amend on June 12. On June 30, the superior court denied West's motion to reconsider the rulings from June 12.

¶34 On July 2, the superior court granted the Port's motion for a protective order regarding discovery.

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[6] In that opinion, we did not consider West's attempts to advance the merits of his PRA action against the Port and his arguments regarding the propriety of the superior court's appointment of the special master. West, No. 43004-5-II, slip op. at 13, 15. We reasoned that West was attempting to challenge decisions that were not appealable as a matter of right and were not within the scope of his appeal from the order of dismissal. West, No. 43004-5-II, slip op. at 13, 15.

¶35 On July 14, the superior court entered its order on West's motion to reconsider the May 4 order. The superior court vacated the May 4 order and ordered an in-camera review of the records that the Port withheld.

¶36 On August 3, West filed another notice seeking discretionary review from this court regarding "the Order of the [superior court judge] entered on June 30, 2015 and July 2, 2015, denying plaintiff's Motion to Amend and granting a protective Order limiting discovery." CP at 278. The record does not show we accepted discretionary review.

¶37 On September 4, the **[*14]** Port moved to dismiss the lawsuit under CR 12(b)(6) and CR 56. On November 20, the superior court granted the Port's motion to dismiss after a hearing. West appealed the superior court's ruling to this court the same day. West later moved for reconsideration of the November 20 order. The superior court denied West's motion to reconsider.

ANALYSIS

A. THE SUPERIOR COURT DID NOT ERR IN DISMISSING THE SUIT

¶38 West argues that the superior court erred in dismissing this suit. The Port moved to dismiss West's suit under CR 12(b)(6) and CR 56. We hold that the superior court did not err in relying on *Hobbs* and dismissing West's suit.[7]

1. Standard of Review

¶39 We review PRA cases de novo. *Nissen v. Pierce County, 183 Wn.2d 863, 872, 357 P.3d 45 (2015)*. We also review dismissals under CR 12(b)(6) de novo. *Worthington v. Westnet, 182 Wn.2d 500, 506, 341 P.3d 995 (2015)*. Dismissals under CR 12(b)(6) are proper "only where there is not only an absence of facts set out in the complaint to support a claim of relief, but there is no hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim." *Worthington, 182 Wn.2d at 505*.

¶40 If a party brings a motion to dismiss under CR 12(b)(6), but "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [CR] 56." CR 12(b)(7). Affidavits submitted **[*15]** in a CR 12(b)(6) motion are "matters outside the pleadings" that convert the CR 12(b)(6) motion into a CR 56 summary judgment motion. *Highline Sch. Dist. No. 401 v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976)*.

¶41 Here, the superior court considered facts beyond those stated in West's complaint. *See, e.g.*, CP at 498 (Michels's declaration). Therefore, we treat the superior court's dismissal of West's suit as a decision on a motion for summary judgment. *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985)*.

¶42 Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We review a superior court's decision on summary judgment de novo. *Didlake v. State, 186 Wn. App. 417, 422, 345 P.3d 43, review denied, 184 Wn.2d 1009 (2015)*.

2. *Hobbs v. State*

¶43 In *Hobbs*, we considered a superior court's order dismissing Hobbs PRA claim against the State Auditor's Office. *183 Wn. App. at 928*. Hobbs requested public records from the Auditor on November 28, 2011, including a large amount of technical information relating to the requested records. *Id. at 929*. The Auditor responded on December 2, acknowledging the request and stating that the first installment of records would be available after December 16. *Id.* The Auditor made the first installment available to Hobbs electronically on December 21. *Id. at 929-30*. Hobbs filed suit alleging PRA violations on December 23. *Id. at 932*.

¶44 The Auditor continued to respond to Hobbs's PRA request. **[*16]** *Id. at 930*. On December 30, the Auditor gave Hobbs a new copy of the previously provided documents, using a numbering system created to correspond to explanations of the redactions. *Id.* The Auditor also told Hobbs that the next installment would be ready on January 13, 2012. *Id.*

¶45 On January 6, the Auditor informed Hobbs that the final installment would be ready on February 13. *Id.* However, on January 19, the Auditor informed Hobbs that the remaining records would not be available until March 1 due to technical issues. *Id. at 931*.

¶46 Between February 13 and 17, the Auditor sent Hobbs additional requested records, an updated copy of the December 30 documents addressing concerns Hobbs had raised, and an e-mail notifying Hobbs of further technical issues. *Id.* On March 1, the Auditor sent the remaining records

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[7] West also argues that the superior court erred in denying his motion to reconsider the dismissal. That argument is not addressed for two reasons: (1) it was not designated in the notice of appeal and we did not grant a motion to accept an amended notice of appeal including the order denying reconsideration; and (2) we hold that the superior court did not err in dismissing this case, so the superior court similarly did not err in denying West's motion to reconsider.

and an e-mail stating that it believed it had provided all responsive documents. *Id.*

¶47 Multiple hearings ensued until the superior court issued its final order in November 2012. *Id. at 934*. The superior court's final order ruled that "providing records in updated installments while [Hobbs's] public records requests were still pending was not a 'denial' of records for PRA purposes." *Id.* (quoting the record).

¶48 On appeal, *[*17] Hobbs* held, "Under the PRA, a requester may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a record," and, though not specifically defined, "a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records." *Id. at 935-36*. *Hobbs* reasoned that *RCW 42.56.550(1)* permits superior courts to hear motions to show cause "when a person has 'been denied an opportunity to inspect or copy a public record by an agency,'" and looked at other provisions within the PRA, such as *RCW 42.56.520*, which refers to "'final agency action or final action.'" *Id. at 936* (emphasis omitted) (quoting *RCW 42.56.550(1), .520*). *Hobbs* concluded that the plain language of the statute dictates that "being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA." *Id. at 936-37*.

¶49 Applying these conclusions to the facts, *Hobbs* held "that the Auditor was continuing to provide Hobbs with responsive records until March 1," and, "[t]herefore, there could be no 'denial' of records forming the basis for judicial review." *Id. at 936-37*. Accordingly, *Hobbs* held that the superior court did not err in dismissing the Hobbs's PRA suit **[*18]** against the Auditor. *Id. at 946*.

3. Application of *Hobbs* Requires Dismissal of West's Suit

¶50 Here, just as in *Hobbs*, there is no dispute that the Port responded to West's request within the five-day statutory window and provided West with an anticipated disclosure date for the first installment, but failed to meet that anticipated disclosure date. *Id. at 930-32*. Also, as in *Hobbs*, the Port maintained active communication with West about his request and produced multiple installments of records over several months, despite the initiation of a lawsuit before the production of records was completed. *Id.* Thus, the conclusion reached in *Hobbs* is necessarily the conclusion we reach here—that West's suit against the Port was premature under the plain language of the PRA because "being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA," and the Port had not "engaged in some final action denying access to a record" at the time West filed the suit. *Id. at 936*.

¶51 Because the suit was premature, West's complaint failed as a matter of law and dismissal was proper. *CR 56(c)*. Therefore, we hold that the superior court did not err in dismissing West's suit against the Port.

[*19] 4. West's Other Arguments are not Persuasive

a. Attempts to Distinguish *Hobbs*

i. Allegedly Distinguishable Facts

¶52 West attempts to distinguish his suit from *Hobbs* by arguing that the Port had not delivered on its expected first installment production dates. West's argument is not persuasive for several reasons.

¶53 First, *Hobbs* is factually similar to this case. The Auditor in *Hobbs* also did not produce records on the date it initially estimated. *Hobbs, 183 Wn. App. at 929-30*.

¶54 Second, the "PRA contains no provision requiring an agency to strictly comply with its estimated production date," but instead "gives an agency additional time to respond to a request based on the need to 'locate and assemble the information requested.'" *Andrews v. Wash. State Patrol, 183 Wn. App. 644, 651-52, 334 P.3d 94 (2014), review denied, 182 Wn.2d 1011 (2015)* (quoting *RCW 42.56.520*). *Hobbs* expressly adopted the *Andrews* holding and stated that the PRA "[does] not require an agency to comply with its own self-imposed deadlines as long as the agency was acting diligently in responding to the request in a reasonable and thorough manner." *Hobbs, 183 Wn. App. at 940*.

¶55 Third, West does not contend, nor does he provide any evidence to support an inference, that the Port was not diligent in its efforts to fulfill the request. Nor does West contend or provide any evidence to support an **[*20]** inference that the postponement of first installment's production was not in good faith.

¶56 Finally, and from a practical perspective, West made his request right as the winter holiday season typically begins, in early December 2007, and filed suit against the Port barely a month later, on January 14, 2008. The Port communicated with West throughout the height of that holiday season, on December 21, 26, and 31. Therefore, the fact that West filed his suit before the Port had produced the first installment of records does not distinguish West's suit from *Hobbs* such that the legal principals explained in *Hobbs* are rendered inapplicable.

¶57 West also argues *Hobbs* does not control the outcome of this case because the plaintiff in *Hobbs* asserted a cause of action under *RCW 42.56.550(1)*, and West asserted his cause

of action under RCW 42.56.550(2). This argument fails because West did not assert a cause of action under RCW 42.56.550(2) nor did West seek the relief that a cause of action under RCW 42.56.550(2) would provide.

¶58 RCW 42.56.550 governs judicial review of agency actions and provides in part:

> (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained [*21] may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency 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.
>
> (2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

¶59 West's complaint did not identify RCW 42.56.550(2) as the basis for his cause of action, nor did it seek to have the superior court "require the responsible agency to show that the estimate it provided [wa]s reasonable." RCW 42.56.550(2). Instead, West's asserted cause of action under the PRA was that "[b]y their acts and omissions, defendants illegally and unconstitutionally violated RCW 42.56, damaging plaintiff, the public, and the State, for [*22] which relief should issue as requested below." CP at 4. The relief West requested was that, "[t]hat an order issue under the Oseal of this Court declaring that defendant Port of Tacoma violated the PRA and their self imposed [sic] elevated duty of transparency, and compelling disclosure of all requested records, and assessing penalties and costs for each individual record that has been witheld [sic]." CP at 5. Therefore, West's argument that *Hobbs* is distinguishable because West sought relief under RCW 42.56.550(2) rather than RCW 42.56.550(1) fails because West's suit did not seek to "require the responsible agency to show that the estimate it provided is reasonable," which is the relief RCW 42.56.550(2) provides.

¶60 Finally, to the extent West's citations to *Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 59 P.3d 109 (2002)*, are intended to support an assertion that his complaint was necessary to get the Port to respond, this argument is not persuasive. *Violante* is older than *Hobbs* and was decided by Division One of this court. Therefore, even if the holdings *Violante* and *Hobbs* were in conflict, which we do not consider, the precedent set by *Violante* does not bind this court. *See*, Mark DeForrest, *In the Groove or in A Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial [*23] Court Level*, 48 Gonz. L. Rev. 455, 487-88 (2013).[8]

ii. The *Hobbs* Holding is not Dicta

¶61 West argues that the holding in *Hobbs* that necessitates dismissal of his suit against the Port was dicta and not binding on this court. Specifically, West argues, "In [*Hobbs*], the Court actually reached the merits of Hobbs'[s] claims, and found no violation, making the portions of their ruling on the timing of Hobbs['s] suit obiter dictum inapplicable to cases where an actual violation of the PRA is present." Br. of Appellant at 36-37. We disagree.

¶62 "Obiter dictum" is Latin for "'something said in passing.'" and is, "'[a] judicial comment made during the course of delivering a judicial opinion, [*24] but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).'" *Pierce County v. State, 150 Wn.2d 422, 435 n.8, 78 P.3d 640 (2003)* (quoting BLACK'S LAW DICTIONARY 1100 (7th ed. 1999)). "Obiter dictum" is generally abbreviated to "dicta." *State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 89, 273 P.2d 464 (1954)*. The conceptual distinction between a court's holding and what may be considered "dicta" has been explained: "The principal feature of holdings is that they are necessary to decide a case, and the principal feature of dicta is that they are not." Shawn J. Bayern, *Case Interpretation*, 36 Fla. St. U. L. Rev. 125, 129 (2009).

¶63 But as the United States Supreme Court recognized long ago,

> It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons

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[8] As Professor DeForrest explains:

> The Washington court system has a developed notion of vertical *stare decisis* regarding the binding nature of state supreme court decisions on the court of appeals, as well as an approach to the authority of the decisions of each division of the court of appeals. Decisions of the state supreme court are binding on all lower Washington courts, whether trial courts or the appellate court sitting in its divisions. Decisions of a division of the court of appeals are binding on all state trial courts, but not on the other divisions of the court of appeals.

Id. at 487-88 (2013) (footnotes omitted).

> for the same conclusion. It is true that in this case the other reason was more dwelt upon and perhaps it was more fully argued and considered than section 3477, but we cannot hold that the use of the section in the opinion is not to be regarded as authority, except by directly reversing the decision in that case on that point, which we do not wish to do.

Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 340, 48 S. Ct. 194, 72 L. Ed. 303, 65 Ct. Cl. 761, 1928 Dec. Comm'r Pat. 246 (1928). That alternative holdings are not dicta, but are instead binding precedent, remains true today. *See, e.g., Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1255-56 (11th Cir. 2017)* (citing, among others, *Hitchcock v. Sec'y, Florida Dep't of Corr., 745 F.3d 476 (11th Cir. 2014)* for the proposition, "[A]n alternative **[*25]** holding is not dicta but instead is binding precedent.").

¶64 Here, the first issue considered in *Hobbs* was whether "a requester is permitted to initiate a lawsuit *prior* to an agency's denial and closure of a public records request." *183 Wn. App. at 935*. To that point, *Hobbs* held that "before a requester initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Id. at 936*. Thus, the requirement that "there must be some agency action, or inaction, indicating that the agency will not be providing responsive records" before a PRA suit could be filed was the holding on the primary issue on appeal in *Hobbs*. *Id.* To the extent the *Hobbs* court provided further holdings for why the superior court did not err, they would be alternative holdings in *Hobbs*. Alternative holdings are not dicta, but instead provide binding precedent. *See, e.g., Richmond Screw Anchor Co., 275 U.S. at 340*.

b. Misplaced Reliance on This Court's Decision in a Previous Appeal

¶65 West argues that our 2014 opinion in this case "expressly held that the Port was not producing records at the time the suit was filed," when we said, "'the port repeatedly pushed back its expected release date.'" Br. of Appellant **[*26]** at 23 (quoting *West, No. 43004-5-II, slip op. at 2*). West's argument misunderstands the basis of our 2014 opinion.

¶66 Here, there is no dispute that the Port did not meet its first two expected installment delivery dates. However, under the PRA, West may only initiate a lawsuit to compel compliance with the PRA *after* the Port has engaged in some final action denying access to a record. *Hobbs, 183 Wn. App. at 935*. And the PRA does not require the Port to comply strictly with its estimated production dates. *Andrews, 183 Wn. App. at 651-52*. Therefore, the necessary conclusion is that dismissal as a matter of law was proper. *Hobbs, 183 Wn. App. at 935*.

¶67 Our 2014 opinion does not change the necessary conclusion dictated by *Hobbs* because the 2014 opinion only considered the propriety of dismissal only under *CR 41* and expressly did not consider the PRA claims. *West, No. 43004-5-II, slip op. at 13, 15*. The issue in the 2014 appeal was whether the superior court properly based its dismissal on *CR 41(b)(1), (2)*, or the superior court's inherent power. *West, No. 43004-5-II, slip op. at 1*. We held that dismissal under *CR 41* was not proper because the notice requirements of *CR 41(b)(1)* and *(2)* were not met, and the superior court did not rely on its inherent authority in dismissing the case. *West, No. 43004-5-II, slip op. at 1*. We did not consider the arguments West made regarding the various **[*27]** superior court orders on the alleged violations of the PRA because the those issues were neither appealable as a matter of right nor were they within the scope of the appeal from the order of dismissal. *West, No. 43004-5-II, slip op. at 13, 15*. Thus, our 2014 opinion has no bearing on the issues in the current appeal, which concern whether West prematurely filed suit.

c. Waiver Argument is not Relevant

¶68 West argues that the Port waived any argument against superior court having jurisdiction over this case.[9] This argument is not relevant to the issue on appeal. On appeal, we are considering whether West's suit was prematurely filed and should be dismissed as a matter of law. Thus, West's challenge to the superior court's jurisdiction is not relevant to the issues presented to this court.

d. Appearance of Fairness and the *Fifth Amendment* Arguments Fail

¶69 West argues in a heading that the superior court "erred in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the *5th Amendment* and in refusing to conduct a show cause hearing and determine if the court violated the PRA." Br. of Appellant at 44 (some capitalization omitted). These arguments fail.

¶70 First, West provides no further argument or **[*28]** citation for his assertions that the appearance of fairness doctrine or his constitutional *Fifth Amendment* rights were violated. As such, we need not consider these arguments further. *See RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)* (holding

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[9] West also asserts in a heading that the Port submitted to the superior court's jurisdiction under res judicata, collateral estoppel, and equitable estoppel. West provides no citations to legal authority to support his theory. Therefore, we need not consider this assertion. *See RAP 10.3(a)(6); **Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)*** (holding that where arguments are not supported by authority, this court does not consider them).

that where arguments are not supported by authority, this court does not consider them).

¶71 Second, and as explained above, the superior court properly dismissed this case because it was filed prematurely. Therefore, the superior court did not err in failing to conduct a show cause hearing on the merits of the alleged PRA violations.

B. THE ORDER DENYING THE MOTION TO AMEND IS NOT BEFORE THIS COURT

¶72 West argues that the superior court erred in denying his motion to amend his complaint. We do not consider this argument because the issue is not before us on appeal.

¶73 RAP 5.3(a) requires that a notice of appeal must "designate the decision or part of decision which the party wants reviewed." Generally, we will not review an order that was not designated in the notice of appeal. RAP 2.4(a). A caveat to this general rule is that we will also review those decisions designated in a notice for discretionary review, where such discretionary review has been accepted. RAP 2.4(a), RAP 2.3(e).

¶74 The party seeking discretionary review has "within the longer of (1) 30 [*29] days after the act of the trial court that the party filing the notice wants reviewed or (2) 30 days after entry of an order deciding a timely motion for reconsideration of that act." RAP 5.2(b). When seeking discretionary review, the noting party must pay the filing fee at the time the notice is filed. RAP 5.1(b).

¶75 In his notice of appeal, West sought this court's review of "the Order of the [superior court judge] entered on November 20, 2015." CP at 430.[10] The order entered on November 20, 2015 by the superior court judge was the order "Granting Dismissing Suit." CP at 431. Thus, West did not designate the order denying his motion to amend in his notice of appeal.

¶76 The record does not show that we accepted review of West's notice of discretionary review relating to the superior court's order denying West's motion to amend the complaint. Instead, the record shows that West did not timely file the notice of discretionary review because it was not filed within 30 days of June 30, and the record does not show that West paid the filing fee.

¶77 Thus, West did not designate the superior court's denial of his motion to amend in his notice of appeal and there is no indication in the record that West's notice for discretionary review was [*30] accepted. Therefore, we do not consider West's argument that the superior court abused its discretion in denying his motion to amend the complaint. RAP 2.3(e), RAP 2.4(a), RAP 5.1(b), RAP 5.2(b).

C. ATTORNEY FEES AND COSTS ON APPEAL

¶78 Both parties request fees and costs on appeal. We decline to award fees to West and award fees and costs to the Port.

¶79 West requests fees under RAP 18.1 and RCW 42.56.550(4). Under RCW 42.56.550(4), a party prevailing against an agency in a PRA suit is entitled to an award of fees and costs. Because West does not prevail in this action, he is not entitled to an award of fees and costs.

¶80 The Port requests fees and costs under RAP 18.1, RAP 18.9, and RCW 4.84.185 for defending a frivolous appeal. Under RCW 4.84.185, an action is frivolous if, "considering the action in its entirety, it cannot be supported by any rational argument based in fact or law." *Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 785, 275 P.3d 339, review denied, 175 Wn.2d 1008 (2012).* Under RAP 18.9, an appeal is frivolous if it is so devoid of merit that there exists no reasonable possibility of reversal. *In re Marriage of Healy, 35 Wn. App. 402, 406, 667 P.2d 114, review denied, 100 Wn.2d 1023 (1983).* Because West's appeal did not present debatable issues on which there was a reasonable possibility of reversal, we exercise our discretion and award attorney fees and costs to the Port.

¶81 We affirm the superior court's order dismissing the suit.

¶82 A majority of the panel having determined [*31] that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, A.C.J., and SUTTON, J., concur.

Reconsideration denied November 16, 2017.

End of Document

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[10] Even in the amended notice of appeal that West moved this court to accept, the orders for which review was sought were the order to dismiss and the order denying reconsideration of the motion to dismiss, entered on November 20, 2015 and December 15, 2015, respectively.

APPENDIX E

Neutral
As of: April 12, 2018 11:21 PM Z

Northup v. Dep't of Corr.

Court of Appeals of Washington, Division One

July 6, 2015, Filed

No. 72256-5-I

Reporter
2015 Wash. App. LEXIS 1432 *

ROBERT NORTHUP, *Respondent*, v. THE DEPARTMENT OF CORRECTIONS, *Appellant*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Northup v. Dep't of Corr., 2015 Wash. App. LEXIS 1838 (Wash. Ct. App., July 6, 2015)*

Prior History: [*1] County: Snohomish. Docket No(s): 12-2-01722-9. Judge signing: Mary Elizabeth Dingledy. Judgment or other matter being reviewed: Order Denying Defendant's Motion for Summary Judgment & Granting Plaintiff's Cross-Motion for Summary Judgment. Date entered: June 13, 2014.

Judges: Written by: Judge Dwyer. Concurred in by: Judge Spearman; Judge Appelwick.

Opinion by: Dwyer

Opinion

¶1 DWYER, J. — The Department of Corrections appeals from an order granting prisoner Robert Northup's motion for summary judgment and awarding him penalties, attorney fees, and costs under the Public Records Act (PRA), *chapter 42.56 RCW*. The Department contends that the trial court erred by finding a violation of the PRA and by awarding Northup penalties as well as attorney fees and costs because—among other reasons—Northup had no cause of action under the PRA at the time he brought the relevant claims.[1] We agree and, accordingly, reverse and remand for the judgment to be vacated and the action dismissed.

I

A. Northup's Public Records Request

¶2 In February 2013, the Department of Corrections received a public records request from Northup, an inmate [*2] in the Department's custody. This request contained nine parts, including a request for a "Copy of the FBI de-brief hearing of Robert Northup, # 761654 sent via email to William Riley by Special Agent Michael Rollins" and a request for "All other emails from FBI Special Agent Michael Rollins to any staff member of the Department of Corrections from June 1, 2010 to January 1, 2013."

¶3 On February 25, 2013, within five business days of receiving the request, the Department sent a letter to Northup acknowledging the request and seeking clarification on part of the request. The Department notified Northup that it would identify and gather records and that it would provide a further response within 45 business days (by April 29, 2013). After the Department received clarification from Northup, it understood one portion of his request to be seeking any record in which his name was mentioned from June 1, 2010 until February 15, 2013.

¶4 Northup's request was assigned to Jamie Gerken, the manager of the Department's Public Disclosure Unit. She had worked in the unit for over six years and had received over 64 hours of formal public records training. She typically handled requests that were large, [*3] complex, or especially sensitive. Gerken described Northup's request as one of the most complex and time consuming of the approximately 1,280 requests that she had handled.

¶5 In response to Northup's request, the Department ran several computer searches in the Symantec Enterprise Vault. In total, over 17,000 e-mail were discovered that were potentially responsive to one of the items in Northup's request. Over 5,000 e-mail were potentially responsive to another portion of the request, and responding to this portion of the request required the Department to conduct more

[1] Northup also cross appeals. Given our resolution of the matter, we do not reach any of the issues raised in his cross appeal.

detailed and complex computer searches in order to narrow the number of results and allow for a determination as to whether the e-mail were, in fact, responsive. Department staff also had to review sensitive records for redactions. While the Department reviewed these documents, it continued to produce other records that required less intensive review.

¶6 The Department notified Northup on April 29, 2013 that the first installment of records was available once payment was received. Upon receiving payment, the Department provided the first installment of records. Because Northup had requested that the records be sent to his attorney, [*4] the Department mailed the records to his attorney and mailed a letter directly to Northup informing him that the records had been sent.

¶7 The Department provided additional installments on July 17, 2013, September 3, 2013, and October 14, 2013.[2] The October 2013 installment contained a document concerning the debriefing of a confidential informant.[3] The inmate participated in the debriefing with law enforcement officers as part of the Department's process allowing an offender to renounce his gang affiliation. The 16-page "debrief" or confidential informant record was generated after the interview and contained detailed notes of the interview. The Department redacted information in the debrief, it stated, pursuant to *RCW 42.56.240(1)* and *RCW 42.56.240(12)*.[4] The Department provided Northup's attorney with an Agency Denial Form/Exemption Log which identified the basis for each of the redactions.

¶8 The Department continued to provide installments of requested records. Such installments were provided on November 21, 2013, January 7, 2014, February 12, 2014, and March 26, 2014. As of May 29, 2014, Northup's February 2013 request was still active and, in response thereto, the Department [*6] was continuing to search, gather, and review records.[5] As of that date, the Department had identified, redacted (where necessary), and produced 5,664 pages of responsive records and 1,104 native-format files in response to Northup's February 2013 request.

B. Procedural History

¶9 Northup filed this lawsuit in December 2012. His original complaint challenged an unrelated public records request from 2010. In June 2013, while the Department continued to respond to his February 2013 request, Northup amended his complaint to challenge the Department's response to the February 2013 request.

¶10 In the trial court, Northup challenged the Department's redaction of the debriefing document. He also challenged the timeliness of a small number of e-mail that were made available to him on February 12, 2014, as part of the seventh installment of records.[6]

¶11 The Department moved for summary [*7] judgment arguing that Northup's claims related to the 2010 request were barred by the statute of limitation, that the redactions made to the debrief were authorized by *RCW 42.56.240(1)* and *RCW 42.56.240(12)*, that the Department had otherwise complied with the PRA in its handling of Northup's February 2013 request, and that Northup's claims were not ripe because its response to his records request was not final but, rather, was ongoing. The trial court granted Northup's request for a continuance pursuant to Civil Rule 56(f) and set a briefing schedule.

¶12 Northup then filed a cross motion for summary judgment.

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[2] These dates refer to the day on which the Department disclosed the records to Northup by making them available for his inspection and copying via a cost letter. *See, e.g.*, ***Sanders v. State, 169 Wn.2d 827, 835-36, 240 P.3d 120 (2010)***; ***Mitchell v. Wash. Dep't of Corr., 164 Wn. App. 597, 603, 277 P.3d 670 (2011)***.

[3] Northup has identified himself as this confidential informant.

[4] ***RCW 42.56.240*** provides, in pertinent part:

> The following investigative, law enforcement, and crime victim information [*5] is exempt from public inspection and copying under this chapter:
>
> (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;
>
> ...
>
> (12) The following security threat group information collected and maintained by the department of corrections pursuant to RCW 72.09.745: (a) Information that could lead to the identification of a person's security threat group status, affiliation, or activities; (b) information that reveals specific security threats associated with the operation and activities of security threat groups; and (c) information that identifies the number of security threat group members, affiliates, or associates.

[5] This information was provided by Gerken in a declaration submitted to the trial court in support of the Department's motion for reconsideration.

[6] These e-mail were sent to Northup on March 5, 2014, after the Department had received payment for the seventh installment of records. The parties refer to them as the March 5, 2014 e-mail.

The trial court heard argument on both parties' motions on April 16, 2014. Despite the fact that the Department had been continuing to produce responsive records, the trial court ruled that the Department violated the PRA in its production of the March 5, 2014 e-mail. The trial court took the remaining arguments under advisement to conduct an *in camera* review of the debrief document.[7]

¶13 The trial court issued an oral ruling on May 16, 2014 denying the Department's motion for summary judgment and granting Northup's cross motion for summary judgment. In addition to the violation previously [*8] found, the trial court ruled that 792 of the 799 redactions made by the Department to the debrief were improper. The court determined that the investigative records/intelligence information exemption found in *RCW 42.56.240(1)* did not apply because the debrief contained "generalized information only." The court also ruled that the exemption in *RCW 42.56.240(12)* did not apply because Northup knew the information contained in the debrief and, therefore, the debrief did not reveal any security threat group information to Northup. The court awarded daily penalties to Northup based on the court's analysis of the *Yousoufian*[8] factors. A written order reflecting the trial court's oral ruling was entered on June 12, 2014. In a separate order, entered on July 9, 2014, the Court also awarded Northup $20,000 in attorney fees and $553.50 in costs.

¶14 The court denied the Department's motion for reconsideration. The Department then filed a timely notice of appeal. The Department raises several issues on appeal. It contends (1) that the trial court was required to dismiss Northup's claims for lack of a cause of action, (2) that the trial court erred by ruling that the Department's response to Northup's public records request violated [*9] the PRA, (3) that the trial court erred by finding that the Department acted in bad faith, (4) that the trial court erred by awarding Northup daily penalties based on the PRA violations, and (5) that the trial court erred by awarding Northup attorney fees and costs.

¶15 Northup filed a cross appeal. Northup raises several issues in his cross appeal. The majority of these issues relate to the trial court's dismissal of his claims arising from the 2010 public records request. These claims were dismissed on summary judgment by order entered on January 14, 2014. However, Northup did not appeal from the trial court's order of January 14, 2014.[9] With regard to his 2013 request, Northup's primary claim is that the trial court's award of daily penalties was erroneously calculated.

II

¶16 The Department contends that Northup's lawsuit related to his 2013 request was brought prematurely. This is so, it asserts, because a cause of action under the PRA does not arise until the agency has taken final agency action. The Department's contention is consistent with Division Two's recent decision in *Hobbs v. Wash. State Auditor's Office, 183 Wn. App. 925, 335 P.3d 1004 (2014)*.[10]

¶17 *Hobbs* concerned a public records request filed with the state auditor's office. In that case, the requestor, Hobbs, filed a lawsuit challenging the auditor's response to his request just two days after the auditor had provided him with the first [*11] of several anticipated installments of responsive records. While Hobbs' lawsuit was pending, the auditor continued to provide responsive records, ceasing only when it believed that it had provided all of the records that were responsive to Hobbs' request. The auditor also filed a motion in the trial court seeking a ruling that Hobbs had no cause of action with respect to the initial installments it had provided because, at the time the lawsuit was commenced, it was still in the process of responding to Hobbs' request and, therefore, could not yet have denied him access to any records. The trial court agreed with the auditor and dismissed Hobbs' claims.

¶18 On appeal, "Hobbs [took] the position that a requestor is permitted to initiate a lawsuit *prior* to an agency's denial and closure of a public records request." *Hobbs, 183 Wn. App. at 935*. Division Two rebuffed his contention, stating, "The PRA allows no such thing. Under the PRA, a requestor may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a

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[7] The 16-page debrief document was filed under seal.

[8] ***Yousoufian v. King County, 168 Wn.2d 444, 229 P.3d 735 (2010).***

[9] Northup filed a motion seeking to amend his notice of cross appeal to include review of the trial court's order of January 14, 2014 dismissing his claims related to his 2010 public records request. Extension of the time period for appealing from a dispositive order or judgment is seldom granted. ***See Beckman v. Dep't of Social & Health Servs., 102 Wn. App. 687, 694, 11 P.3d 313 (2000).*** We will review a trial court order that was not designated in the notice of appeal only if the order prejudicially affects [*10] the decision that was designated in the notice. *See RAP 2.4(b)*. Here, Northup asks us to review an order concerning a separate public records request that is unrelated to the order from which he timely appealed. Because Northup does not establish sufficient grounds for either (1) extending the time for filing his notice of appeal pursuant to *RAP 18.8(b)*, or (2) expanding the scope of this court's review pursuant to *RAP 2.4(b)*, his motion is denied. Given our resolution of the primary issue on appeal, Northup's motion to submit additional evidence on appeal, pursuant to *RAP 9.11*, is also denied.

[10] *Hobbs* had not been decided when the trial court rendered its decisions in this case.

record." Hobbs, 183 Wn. App. at 935-36.

¶19 The court's firm conclusion was driven by the plain language of the PRA. As the court explained,

> Under RCW 42.56.550(1), the superior court may hear [*12] a motion to show cause when a person has "been denied an opportunity to inspect or copy a public record by an agency." Therefore, being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, we conclude that a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.
>
> ...
>
> .... The language in RCW 42.56.520[11] itself refers to "final agency action or final action." Thus, based on the plain language of the PRA, we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records.

Hobbs, 183 Wn. App. at 936.

¶20 Applying these principles to the facts present [*13] therein, the *Hobbs* court concluded:

> Here, there is no dispute that the Auditor was continuing to provide Hobbs with responsive records until March 1, 2012, when the Auditor determined it had provided all responsive documents to Hobbs' public records request. Therefore, there could be no "denial" of records forming a basis for judicial review until March 1, 2012. The plain language of the statute does not support Hobbs' claim that a requester is permitted to initiate a lawsuit before an agency has taken some form of final action in denying the request by not providing responsive documents.

183 Wn. App. at 936-37.[12]

¶21 Here, there is no dispute that the Department was continuing to provide Northup with records responsive to his February 2013 request in June 2013, when he brought his claims challenging the Department's response. In fact, the Department continued to provide installments [*14] of records to him periodically through the entire period of the underlying litigation, ceasing only after the trial court's oral pronouncement on summary judgment. Therefore, at the time that Northup asserted his cause of action in his complaint, there was no final agency action that constituted a denial of records and, thus, formed a basis for judicial review of the Department's response. Northup, in short, did not have a cause of action when he asserted that he did have a cause of action. The superior court erred by not granting the Department's motion to dismiss.

III

¶22 The Hobbs decision forecloses another of Northup's contentions with regard to whether he possessed a cause of action at the time he pleaded it in his complaint.

¶23 Hobbs contended that,

> once an agency has allegedly violated the PRA, that PRA violation exists as a basis for penalties and costs from the time of alleged violation until it is cured, even if it is cured before the requestor would have a cause of action against the agency (i.e., when the agency takes final action in denying public records).

183 Wn. App. at 937. Northup makes a similar argument herein.

¶24 The *Hobbs* court rejected this contention, relying on Division Three's recent decision [*15] in Andrews v. Washington State Patrol, 183 Wn. App. 644, 334 P.3d 94 (2014), review denied, 182 Wn.2d 1011 (2015).[13]

> Division Three of this court recently addressed a similar issue and its decision supports the assertion that agencies can cure PRA violations by voluntarily remedying the alleged problem while the records request is open and the agency is actively working to respond to it.
>
> In *Andrews* ... , the Washington State Patrol (WSP) responded to a public records request by providing an estimated response date of May 1, 2012. However, the WSP inadvertently forgot to send the requestor an extension letter explaining that there would be additional

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[11] RCW 42.56.520 provides, in pertinent part: "Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies ... shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review ... shall constitute *final agency action*." (Emphasis added.)

[12] The court did not address the situation in which an agency completely ignores a records request for an extended period, because, in the case at hand, the auditor was producing records in installments. Similarly, in this case, the Department continued to produce records in installments throughout the period of superior court litigation.

[13] *Andrews* also had not been decided when the trial court rendered its decision in this case.

delays caused by the complexity of the request. On May 3, the requester filed a lawsuit alleging that the WSP violated the PRA by failing to respond to the request by their estimated response date. On May 9, the WSP responded to the requester explaining the complexity of the request and provided a new estimated time for responding to the request. On May 25, the WSP fully responded to the requester's public records request. The requester continued to argue that he was entitled to penalties for the entire period of time between the WSP's estimated response date and the date the WSP ultimately responded to the request.

The court disagreed **[*16]** and declined to impose a "mechanically strict finding of a PRA violation whenever timelines are missed." Instead, the court held that the PRA did not require an agency to comply with its own self-imposed deadlines as long as the agency was acting diligently in responding to the request in a reasonable and thorough manner. Because the WSP acted diligently in its attempts to respond to the PRA request, and the WSP's "thoroughness of response [was] not an issue," the court affirmed the trial court's order granting summary judgment in favor of the WSP.

Hobbs, 183 Wn. App. at 939-40 (alteration in original) (footnote and citations omitted) (quoting *Andrews, 183 Wn. App. at 653-54*).

¶25 Elucidating upon the holding in *Andrews*, the *Hobbs* court held,

When an agency diligently makes every reasonable effort to comply with a requestor's public records request, and the agency has fully remedied any alleged violation of the PRA at the time the requestor has a cause of action (i.e., when the agency has taken final action and denied the requested records), there is no violation entitling the requester to penalties or fees.

183 Wn. App. at 940-41.

¶26 Thus, two relevant principles emerge from *Hobbs*. First, **[*17]** a claim alleging a PRA violation may not be brought until the responding agency takes final action respecting the relevant request. Second, before it takes final action with respect to a public records request, a responding agency may remedy a deficiency in an earlier installment and, thereafter, the earlier deficiency may not form the basis of a claim for an award of penalties or fees under the PRA.

¶27 Herein, the trial court ruled that the Department's response to Northup's public records request violated the PRA in two ways, found that the Department acted in bad faith with respect to those violations, and awarded Northup penalties and fees related to the violations—all while the Department's response was ongoing. Pursuant to the decisions in *Hobbs* and *Andrews*, with which we concur, the superior court's rulings in this regard were erroneous.

¶28 Reversed and remanded for the judgment to be vacated and the complaint to be dismissed.

SPEARMAN, C.J., and APPELWICK, J., concur.

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APPENDIX F

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 1595

Chapter 304, Laws of 2017

65th Legislature
2017 Regular Session

PUBLIC RECORDS REQUESTS--FEES--IDENTIFIABLE RECORDS--BOT REQUESTS

EFFECTIVE DATE: 7/23/2017

Passed by the House April 17, 2017
Yeas 80 Nays 18

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 7, 2017
Yeas 43 Nays 4

CYRUS HABIB

President of the Senate

Approved May 16, 2017 10:40 AM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED HOUSE BILL 1595** as passed by House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

Chief Clerk

FILED

May 16, 2017

Secretary of State
State of Washington

ENGROSSED HOUSE BILL 1595

AS AMENDED BY THE SENATE

Passed Legislature - 2017 Regular Session

State of Washington 65th Legislature 2017 Regular Session

By Representatives Nealey, McBride, Senn, Springer, Koster, Klippert, Dye, Schmick, J. Walsh, Haler, Manweller, Harris, Dent, Peterson, Bergquist, Gregerson, Clibborn, Fey, Fitzgibbon, Dolan, Wilcox, Lytton, Griffey, Hayes, Muri, Goodman, Robinson, Sells, Steele, Kraft, Smith, Tharinger, Stanford, Kloba, Jinkins, Hargrove, Slatter, and Kagi

Read first time 01/25/17. Referred to Committee on State Government.

1 AN ACT Relating to costs associated with responding to public
2 records requests; and amending RCW 42.56.070, 42.56.080, 42.56.120,
3 42.56.130, and 42.56.550.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 42.56.070 and 2005 c 274 s 284 are each amended to
6 read as follows:
7 (1) Each agency, in accordance with published rules, shall make
8 available for public inspection and copying all public records,
9 unless the record falls within the specific exemptions of subsection
10 ((~~(6)~~)) (8) of this section, this chapter, or other statute which
11 exempts or prohibits disclosure of specific information or records.
12 To the extent required to prevent an unreasonable invasion of
13 personal privacy interests protected by this chapter, an agency shall
14 delete identifying details in a manner consistent with this chapter
15 when it makes available or publishes any public record; however, in
16 each case, the justification for the deletion shall be explained
17 fully in writing.
18 (2) For informational purposes, each agency shall publish and
19 maintain a current list containing every law, other than those listed
20 in this chapter, that the agency believes exempts or prohibits
21 disclosure of specific information or records of the agency. An

agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency ((~~shall~~)) may establish, maintain, and make available for public inspection and copying a statement of the actual ((~~per page cost or other costs, if any,~~)) costs that it charges for providing photocopies or electronically produced copies, of public records and a statement of the factors and manner used to determine the actual ((~~per page cost or other costs, if any~~)) costs. Any statement of costs may be adopted by an agency only after providing notice and public hearing.

(a)(i) In determining the actual ((~~per page~~)) cost for providing ((~~photocopies~~)) copies of public records, an agency may include all costs directly incident to copying such public records including:

(A) The actual cost of the paper and the per page cost for use of agency copying equipment; and

(B) The actual cost of the electronic production or file transfer of the record and the use of any cloud-based data storage and processing service.

(ii) In determining other actual costs for providing ((~~photocopies~~)) copies of public records, an agency may include all costs directly incident to:

(A) Shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used; and

(B) Transmitting such records in an electronic format, including the cost of any transmission charge and use of any physical media device provided by the agency.

(b) In determining the actual ((~~per page cost or other~~)) costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and ((~~mail~~)) send the requested public records may be included in an agency's costs.

(8) ((~~An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.~~

~~(9)~~)) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition

may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the administrative procedure act.

Sec. 2. RCW 42.56.080 and 2016 c 163 s 3 are each amended to read as follows:

(1) A public records request must be for identifiable records. A request for all or substantially all records prepared, owned, used, or retained by an agency is not a valid request for identifiable records under this chapter, provided that a request for all records regarding a particular topic or containing a particular keyword or name shall not be considered a request for all of an agency's records.

(2) Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070((~~(9)~~)) (8) or 42.56.240(14), or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received in person during an agency's normal office hours, or by mail or email, for identifiable public records unless exempted by provisions of this chapter. No official format is required for making a records request; however, agencies may recommend that requestors submit requests using an agency provided form or web page.

(3) An agency may deny a bot request that is one of multiple requests from the requestor to the agency within a twenty-four hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential functions of the agency. For purposes of this subsection, "bot

request" means a request for public records that an agency reasonably believes was automatically generated by a computer program or script.

Sec. 3. RCW 42.56.120 and 2016 c 163 s 4 are each amended to read as follows:

(1) No fee shall be charged for the inspection of public records or locating public documents and making them available for copying, except as provided in RCW 42.56.240(14) and subsection (3) of this section. A reasonable charge may be imposed for providing copies of public records and for the use by any person of agency equipment or equipment of the office of the secretary of the senate or the office of the chief clerk of the house of representatives to copy public records, which charges shall not exceed the amount necessary to reimburse the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives for its actual costs directly incident to such copying. When calculating any fees authorized under this section, an agency shall use the most reasonable cost-efficient method available to the agency as part of its normal operations. If any agency translates a record into an alternative electronic format at the request of a requestor, the copy created does not constitute a new public record for purposes of this chapter. Scanning paper records to make electronic copies of such records is a method of copying paper records and does not amount to the creation of a new public record.

(2)(a) Agency charges for ((~~photocopies shall~~)) actual costs may only be imposed in accordance with the ((~~actual per page cost or other~~)) costs established and published by the agency pursuant to RCW 42.56.070(7), and in accordance with the statement of factors and manner used to determine the actual costs. In no event may an agency charge a per page cost greater than the actual ((~~per page~~)) cost as established and published by the agency.

(b) An agency need not calculate the actual costs it charges for providing public records if it has rules or regulations declaring the reasons doing so would be unduly burdensome. To the extent the agency has not determined the actual ((~~per page cost for photocopies of~~)) costs of copying public records, the agency may not charge in excess of:

(i) Fifteen cents per page for photocopies of public records, printed copies of electronic public records when requested by the

person requesting records, or for the use of agency equipment to photocopy public records;

(ii) Ten cents per page for public records scanned into an electronic format or for the use of agency equipment to scan the records;

(iii) Five cents per each four electronic files or attachment uploaded to email, cloud-based data storage service, or other means of electronic delivery; and

(iv) Ten cents per gigabyte for the transmission of public records in an electronic format or for the use of agency equipment to send the records electronically. The agency shall take reasonable steps to provide the records in the most efficient manner available to the agency in its normal operations; and

(v) The actual cost of any digital storage media or device provided by the agency, the actual cost of any container or envelope used to mail the copies to the requestor, and the actual postage or delivery charge.

(c) The charges in (b) of this subsection may be combined to the extent that more than one type of charge applies to copies produced in response to a particular request.

(d) An agency may charge a flat fee of up to two dollars for any request as an alternative to fees authorized under (a) or (b) of this subsection when the agency reasonably estimates and documents that the costs allowed under this subsection are clearly equal to or more than two dollars. An additional flat fee shall not be charged for any installment after the first installment of a request produced in installments. An agency that has elected to charge the flat fee in this subsection for an initial installment may not charge the fees authorized under (a) or (b) of this subsection on subsequent installments.

(e) An agency shall not impose copying charges under this section for access to or downloading of records that the agency routinely posts on its public internet web site prior to receipt of a request unless the requestor has specifically requested that the agency provide copies of such records through other means.

(f) A requestor may ask an agency to provide, and if requested an agency shall provide, a summary of the applicable charges before any copies are made and the requestor may revise the request to reduce the number of copies to be made and reduce the applicable charges.

(3)(a)(i) In addition to the charge imposed for providing copies of public records and for the use by any person of agency equipment copying costs, an agency may include a customized service charge. A customized service charge may only be imposed if the agency estimates that the request would require the use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other agency purposes.

(ii) The customized service charge may reimburse the agency up to the actual cost of providing the services in this subsection.

(b) An agency may not assess a customized service charge unless the agency has notified the requestor of the customized service charge to be applied to the request, including an explanation of why the customized service charge applies, a description of the specific expertise, and a reasonable estimate cost of the charge. The notice also must provide the requestor the opportunity to amend his or her request in order to avoid or reduce the cost of a customized service charge.

(4) An agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request, including a customized service charge. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request. An agency may waive any charge assessed for a request pursuant to agency rules and regulations. An agency may enter into any contract, memorandum of understanding, or other agreement with a requestor that provides an alternative fee arrangement to the charges authorized in this section, or in response to a voluminous or frequently occurring request.

Sec. 4. RCW 42.56.130 and 2005 c 274 s 286 are each amended to read as follows:

The provisions of RCW 42.56.070(7) and (8) and 42.56.120 that establish or allow agencies to establish the costs charged for photocopies or electronically produced copies of public records do not supersede other statutory provisions, other than in this chapter, authorizing or governing fees for copying public records.

Sec. 5. RCW 42.56.550 and 2011 c 273 s 1 are each amended to read as follows:

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency 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.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request <u>or a reasonable estimate of the charges to produce copies of public records</u>, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

1 (6) Actions under this section must be filed within one year of
2 the agency's claim of exemption or the last production of a record on
3 a partial or installment basis.

Passed by the House April 17, 2017.
Passed by the Senate April 7, 2017.
Approved by the Governor May 16, 2017.
Filed in Office of Secretary of State May 16, 2017.

--- END ---

APPENDIX G

Neutral
As of: April 12, 2018 11:53 PM Z

Chen v. City of Medina

Court of Appeals of Washington, Division One

February 10, 2014, Filed

NO. 69429-4-I

Reporter
2014 Wash. App. LEXIS 343 *; 2014 WL 545759

JEFFREY CHEN, *Appellant*, v. THE CITY OF MEDINA, *Respondent*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at Chen v. City of Medina, 2014 Wash. App. LEXIS 409 (Wash. Ct. App., Feb. 10, 2014)

Prior History: [*1] Appeal from Superior Court King County. Docket No(s): 11-2-26960-4 SEA. Judge signing: Gregory Canova. Date entered: September 10, 2012.

Chen v. City of Medina, 2012 U.S. Dist. LEXIS 144755 (W.D. Wash., Oct. 5, 2012)

Disposition: Affirmed.

Counsel: *Marianne Kathryn Jones, Attorney at Law*, Bellevue, WA, for Appellant.

Jeffrey Scott Myers, Law Lyman Daniel Kamerrer et al., Olympia, WA, for Respondent.

Judges: AUTHOR: Leach, C.J. WE CONCUR: Cox, J., Becker, J.

Opinion by: Leach

Opinion

¶1 LEACH, C.J. — Jeffrey Chen appeals a trial court order denying his motion for relief under the Public Records Act (PRA), *chapter 42.56 RCW*, and his motion for reconsideration. Chen claims that he did not receive proper notice before the trial court entered its findings of fact and conclusions of law, that the court should not have entered any findings of fact and conclusions of law when it entered its amended order denying his motion for relief under the PRA, that we should amend the trial court's findings of fact and conclusions of law consistent with his motion for reconsideration, and that the trial court entered a final judgment without resolving all of the issues that he raised. Because Chen demonstrates no prejudice caused by inadequate notice, provides no authority showing that the court erred by entering findings of fact and conclusions of law with the order or permitting us to amend the trial court's findings and conclusions, and the court properly addressed all issues that Chen [*2] raised, we affirm.

FACTS

¶2 Chen is the former chief of police for the City of Medina (City). In November 2010, the City's insurer hired attorney Michael Bolasina to provide legal advice to the City following reports of unauthorized access into its e-mail records. In December 2010, after Bolasina interviewed Chen about complaints of this unauthorized activity, Bolasina asked Chen to review his documentation of Chen's interview statements. Chen resigned two days later without responding to Bolasina's request. After Chen tried to rescind his resignation, City Manager Donna Hanson placed him on administrative leave on December 27, 2010. On January 27, 2011, Chen provided a memorandum contradicting his earlier statements to Bolasina and claiming protection as a whistleblower. Bolasina advised Hanson about her response to Chen and believed that litigation with Chen was likely.

¶3 On February 2, 2011, Bolasina met in an executive session with the city council under *RCW 42.30.110(1)(i)* to provide advice about potential litigation with Chen.[1] Bolasina

[1] *RCW 42.30.110(1)(i)* states,

> (1) Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting.
>
> . . . .

prepared no written report for this meeting. During the executive session, he provided documents to the city council members to assist in the discussion. [*3] Bolasina collected these documents at the end of the executive session. He did not provide these documents to the city council at any later time.

¶4 On February 1, the City hired Stephanie Alexander as its legal counsel out of concern that Bolasina might be a witness in anticipated litigation. Alexander hired Ellen Lenhart to conduct an independent investigation into Chen's resignation. Lenhart interviewed witnesses and prepared a report (Lenhart Report) directed to Alexander on March 23, 2011.[2]

¶5 On March 29, 2011, the City received a public records request from Chen, seeking

> [a]ny and all documents from February 1, 2004, to date regarding or discussing Jeffrey Chen, the current Chief of Police of the City of Medina. This request includes any and all investigative reports prepared by any investigator retained by the City of Medina, including, but not limited to Michael Bolasina and Ellen Lenhart, any and all documents reviewed by the Medina City Council concerning or about Chief Jeffrey Chen, any and all emails of or about Chief Jeffrey Chen, received or sent, and any and all information in whatever form which discusses in any manner the rationale for placing Chief Chen on administrative leave on December 27, 2010.

On March 31, the City provided Chen with an unredacted copy of the Lenhart Report.[3] On April 1, the City requested clarification of Chen's request and direction about what specific identifiable records he sought. In an e-mail to Chen, the City asked, "Are you seeking purely employment records, or all records in which his name and/or position is referenced [*5] in all documents concerning city business since 2/1/2004?" In this e-mail, the City also informed Chen, "In response to the second portion of your request, records will be provided to you as they become available between now and July 31, 2011." On April 4, Chen replied, "I am seeking all records in which Chief Jeff Chen's name and/or position is referenced in all documents concerning the City of Medina's business since 2/1/2004." Hanson terminated Chen on April 27, 2011.[4]

¶6 Chen filed a second records request on June 16, 2011, seeking a recording of the city council meeting on November [*6] 8, 2010, "in its entirety." Because the tape recorded part of a conversation held during a recess in the meeting and the parties to this conversation did not give their permission to record it, Hanson sought legal advice about this request. The legal review caused the City to miss its estimated deadline, but it provided a recording to Chen on July 18.

¶7 In July, the City identified 30,610 separate e-mail potentially responsive to Chen's request, including 2,860 e-mail relevant to the employment investigation. The City provided Chen with an installment of 218 e-mail on July 30, 2011, after a legal review determined that these e-mail were not exempt from disclosure. At that time, the City estimated that an installment of additional records would be available in three months.

¶8 On August 5, 2011, Chen filed this lawsuit against the City for enforcement of the PRA. On August 16, Chen obtained an ex parte order to show cause under RCW 42.56.550 and King County Local Rule 40.1(b)(2)(H). On August 17, Chen moved for an order to lodge documents with the court, which the court denied. On August 26, Chen filed a motion for relief under the PRA. The court held a show cause hearing on September 12.

¶9 On [*7] November 30, 2011, Chen's attorney, Marianne Jones, filed a notice of unavailability from December 17 through and including January 2.[5] On December 1, 2011, the court entered an order on transfer of individual judge

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> (i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

[2] Lenhart interviewed Bolasina, but he did not discuss his legal advice [*4] to the City or provide her with the documents that he provided to the city council during the executive session.

[3] Chen used the Lenhart Report to prepare a response considered at his *Loudermill* hearing held on April 14, 2011. A *Loudermill* hearing is a due process pretermination requirement for certain government employees that gives them an opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-45, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).*

[4] On December 16, 2011, Chen sued the City in the United States District Court for the Western District of Washington for wrongful termination, seeking $14 million in damages. *See Chen v. City of Medina, No. C11-2119, 2013 WL 4511411, 2013 U.S. Dist. LEXIS 120437 (W.D. Wash. August 23, 2013).*

[5] Chen's brief purports to include the text of an "automatic reply" e-mail from Jones's e-mail account that reflected her absence. Nothing in the record contains the text of this alleged automatic reply message.

assignment, effective January 9, 2012. On December 14, a paralegal at Jones's law firm sent an e-mail to the court indicating receipt of this order and stating,

> A hearing took place on September 12, 2011, related to Plaintiff's Motion for [Relief] under RCW 42.56. I checked the Court docket and confirmed that, as of today no ruling has been made on this motion. Can you tell me whether we may expect a [ruling] on the motion prior to the transfer of the case to Judge McCarthy?

On December 15, the court responded that the currently assigned judge would "issue a ruling no later than 1/6/12."

¶10 On December 22, the court asked that each party submit a proposed order on Chen's motion for relief. The City filed and served its proposed order on Tuesday, December 27, 2011.[6] On January [*8] 4, 2012—five court days after the City served its proposed order—the trial court entered an order denying Chen's motion for relief, which included findings of fact and conclusions of law.

¶11 On January 17, 2012, Chen moved for reconsideration. The court denied this motion on April 26 but entered an amended order, which also included findings of fact and conclusions of law. On September 10, 2012, the trial court granted the City's motion for entry of judgment and awarded the City statutory attorney fees under RCW 4.84.010.[7]

¶12 Chen appeals.

STANDARD OF REVIEW

¶13 We review de novo all agency actions challenged under the PRA.[8] We review a trial court's decision to deny a motion for reconsideration for an abuse of discretion.[9] A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds.[10]

ANALYSIS

¶14 Chen identifies the following issues. First, he claims, "Under CR 52(c), the trial court abused its discretion in entering the initial findings of fact and conclusions of law on January 4, 2012, because proper notice was not provided to Chief Chen." Second, he alleges, "The trial court abused its discretion in entering the findings of fact and conclusions of law when their entry was not necessary and a simple order was sufficient." Third, Chen contends,

> The findings of fact and conclusions of law entered on January [ ]4, 2012, and as amended on April 26, 2012, should be deemed void under CR 54(f), because the trial court abused its discretion by entering the findings of fact and conclusions on law on January 4, 2012 without proper notice having been provided to Chief Chen and absent evidence sufficient.

Fourth, Chen asserts, "Alternatively, Chief Chen requests that the appellate court amend the findings of fact and conclusions of law as requested in Chief Chen's motion for reconsideration." Finally, he claims, "The final judgment entered on April 26, 2012, should be vacated, because the trial court's [sic] failed to [*10] address all issues contained in Chief Chen's original motion for relief under the PRA, which constitutes an abuse of discretion." We disagree.

¶15 Chen claims that he did not receive the notice required by CR 52(c) and CR 54(f)(2) before the trial court entered its order on January 4, 2012. He argues that at the time the City served its proposed order, "Medina (i) had been provided prior notice of counsel's unavailability, and (ii) received a responsive email upon service of the proposed findings of fact and conclusions of law, that counsel was unavailable for service. ... Counsel's notice of unavailability had also been filed with the court on November 30, 2011." Chen suggests three ways that the City's purported failure to give the required notice prejudiced him. First, he asserts that had he received proper notice, "all of the factual discrepancies stated within the statement of fact and supported by the Declaration would have been raised." Second, he asserts,

> [T]he trial court would have been apprised that a new lawsuit in Federal Court had just been filed on December 16, 2011 and that it was evident that the attorney for Medina was merely attempting to obtain findings and conclusions [*11] to be entered that [sic] so that Medina may argue subsequently that the findings had been determined.

Third, he asserts,

> [B]ecause the court had not issued an oral ruling or a preliminary written order indicating its decision and/or the basis for its decision, even if Chief Chen was

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[6] Chen submitted his proposed order as an attachment to his motion.

[7] Despite the City's contrary assertion, the court's April 26, 2012, order did not constitute a final judgment. *See* CR 54; RAP 2.2(a)(1).

[8] ***Koenig v. Pierce County, 151 Wn. App. 221, 229, 211 P.3d 423 (2009)*** (citing RCW 42.56.550(3); ***Daines v. Spokane County, 111 Wn. App. 342, 346, 44 P.3d 909 (2002)).***

[9] ***Drake v. Smersh, 122 Wn. App. 147, 151, 89 P.3d 726 (2004).***

[10] ***State v. Emery, 161 Wn. App. 172, 190, 253 P.3d 413 (2011)*** [*9] (quoting ***State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)).***

afforded proper notice under CR 52(c), he was not aware that the court intended to deny his motion. Therefore, Chief Chen could not have known he was a "defeated party" under the rule, and thus, that he was in a position where he needed to object to Medina's proposed findings of fact and conclusions of law, or have them entered against him.

¶16 CR 52(c) states, "[T]he court shall not sign findings of fact or conclusions of law until the defeated party or parties have received 5 days' notice of the time and place of the submission, and have been served with copies of the proposed findings and conclusions." "The purpose of CR 52(c) is to afford the defeated party an opportunity to evaluate and object to the contents of its opponent's proposed findings before the court adopts and enters those findings."[11]

¶17 Similarly, CR 54(f)(2) [*12] states, "No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment." Generally, a failure to comply with this notice requirement renders the trial court's order void.[12] An order entered without the required notice is not invalid, however, if the complaining party shows no resulting prejudice.[13]

¶18 Here, Chen fails to show prejudice from any insufficient notice. Before Jones became unavailable, her law firm learned when the court planned to issue its ruling. Jones knew that the court intended to rule on Chen's motion before January 6, four days after her "unavailability." Chen submitted a proposed order on his motion for relief. The City was obligated to respond to the court's December 22 request for a proposed order. It could not timely comply with the court's request and also accommodate Jones's unavailability. Although the court did not hear [*13] live testimony, it properly considered the evidence that the parties submitted in support of and in opposition to Chen's motion.[14] Chen filed a motion for reconsideration challenging the January 4 findings of fact and conclusions of law, which the court considered and denied. He was also allowed to appeal the judgment and to present all the issues he wished to raise. Additionally, Chen cites no legal authority to support his assertion that service was not effective until the date that counsel became available. Because Chen fails to show prejudice, we deny his challenge on the basis of inadequate notice.

¶19 Next, Chen argues that "the trial court abused its discretion in entering the findings of fact and conclusions of law when their entry was not necessary and a simple order was sufficient." Specifically, he claims that "findings of fact and conclusions of law were not necessary as to the trial court's determination regarding Chief Chen's two primary issues: (1) whether Medina's proposed date of response [*14] was reasonable; and (2) whether Medina afforded Chief Chen its fullest assistance."

¶20 Chen relies upon CR 52(a)(5)(B) to support his claim. This rule states that findings of fact and conclusions of law are not necessary "[o]n decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2)." Because we review the challenged order de novo, the trial court's findings of fact and conclusions of law are superfluous.[15] Thus, Chen again fails to demonstrate prejudice.

¶21 Chen also asks us to amend the trial court's findings of fact and conclusions of law to conform to the requests in his motion for reconsideration. He cites only RAP 7.3 and RAP 12.3(a) as authority supporting this request. RAP 7.3 gives an appellate court authority "to determine whether a matter is properly before it, and to perform all acts necessary or appropriate to secure the fair and orderly review of a case." RAP 12.3(a) defines a "decision terminating review," which includes a decision on the merits.[16]

¶22 As we stated in *Wold v. Wold*,[17] "It is improper for an appellate court to ferret [*15] out a material or ultimate finding of fact from the evidence presented. Such a practice would place the appellate court in the initial decision making process instead of keeping it to the function of review." If a trial court omits findings on material issues, an appellate court will often direct the trial court to make findings on those issues.[18] Because we generally do not amend a trial court's

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[11] *224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn. App. 700, 728, 281 P.3d 693 (2012).*

[12] *Burton v. Ascol, 105 Wn.2d 344, 352, 715 P.2d 110 (1986)* (citing *City of Seattle v. Saga, 11 Wn. App. 481, 482, 523 P.2d 942 (1974)).*

[13] *Burton, 105 Wn.2d at 352* (citing *Soper v. Knaflich, 26 Wn. App. 678, 681, 613 P.2d 1209 (1980)).*

[14] *See* RCW 42.56.550(3); WAC 44-14-08004(1); *O'Neill v. City of Shoreline, 170 Wn.2d 138, 152-53, 240 P.3d 1149 (2010)* (PRA permits court to conduct hearing based solely on affidavits).

[15] *See Donald v. City of Vancouver, 43 Wn. App. 880, 883, 719 P.2d 966 (1986).*

[16] RAP 12.3(a)(3)(i).

[17] *7 Wn. App. 872, 876, 503 P.2d 118 (1972).*

[18] *Wold, 7 Wn. App. at 877* (citing *Peterson v. Neal, 48 Wn.2d 192,*

findings of fact, we reject this claim.

¶23 Finally, Chen alleges, "[T]he trial court's entry of a final judgment without full adjudication of all of the issues was manifestly unreasonable and constitutes an abuse of discretion, and the judgment should be reversed." Chen asserts that the court did not "affirmatively determine whether the [sic] Medina's response date of seven months after Chief Chen's initial request ... was reasonable under RCW 42.56.550(2). Instead, the trial court's decisions simply stated that three months and a decision to provide records in installments was reasonable." He also claims that "the trial court's orders did not address whether Medina [*16] provided the fullest assistance." Further, he contends that the trial court awarded statutory attorney fees to the City prematurely.

¶24 RCW 42.56.550(2) states,

> Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

In his motion for relief, Chen argued that the City's estimated response date, which was three months beyond the originally estimated date of four months, was unreasonable. He asked the trial court to order immediate disclosure. The court implicitly declined this request by concluding that the City acted reasonably when it extended its estimated response date by three months—meaning a total estimated response time of seven months—and when it notified Chen that it would produce the records in installments. Therefore, the court addressed this issue fully.

¶25 RCW 42.56.100 states,

> Agencies shall adopt and enforce reasonable rules [*17] and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information.

The PRA provides no separate cause of action for an agency's failure to provide the fullest assistance to a requester. Chen raises no challenge to any City rules or regulations. Thus, the court did not need to address this allegation. Because the trial court properly concluded that the City was the prevailing party, it did not err in awarding statutory attorney fees to the City.

Attorney Fees

¶26 A party is entitled to attorney fees on appeal if a statute [*18] authorizes the award.[19] Chen requests attorney fees under RCW 42.56.550(4), which allows a person prevailing against an agency in a court action "seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time" to recover costs, including reasonable attorney fees. This statute also gives the court discretion "to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record."[20] Because Chen does not prevail in this action, we deny his request.

¶27 The City requests attorney fees under RAP 18.9(a), which permits an appellate court to award attorney fees to a party as sanctions, terms, or compensatory damages when the opposing party files a frivolous appeal.[21] "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal."[22] In determining if an appeal is frivolous, we resolve all doubts in the appellant's [*19] favor.[23] An appeal is not frivolous merely because the court rejects the appellant's arguments and

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292 P.2d 358 (1956)).

[19] RAP 18.1.

[20] RCW 42.56.550(4).

[21] *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010)* (citing *Reid v. Dalton, 124 Wn. App. 113, 128, 100 P.3d 349 (2004)).*

[22] *Advocates for Responsible Dev., 170 Wn.2d at 580* (citing *Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 241, 119 P.3d 325 (2005)).*

[23] *Advocates for Responsible Dev., 170 Wn.2d at 580* (citing *Tiffany Family Trust Corp., 155 Wn.2d at 241).*

affirms.[24] Because Chen presents debatable issues, we also deny the City's fee request.

CONCLUSION

¶28 Chen fails to show prejudice from any deficiency in the notice he received before the court entered its January 4, 2012, order. He also shows no prejudice caused by the trial court's entry of findings of fact and conclusions of law with its orders and does not persuade us that we should amend the trial court's findings. The court addressed all of the issues that Chen raised in his motion to show cause and properly [*20] awarded statutory attorney fees to the City. For these reasons, we affirm.

Becker and Cox, JJ., concur.

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[24] *Wash. Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc., 168 Wn. App. 710, 719, 282 P.3d 1107 (2012)* (citing ***Tiffany Family Trust Corp., 155 Wn.2d at 241***).

APPENDIX H

Caution
As of: April 13, 2018 12:01 AM Z

Kittitas County v. Allphin

Court of Appeals of Washington, Division Three

April 27, 2016, Oral Argument; August 9, 2016, Filed

No. 33241-1-III

Reporter
195 Wn. App. 355 *; 381 P.3d 1202 **; 2016 Wash. App. LEXIS 1895 ***

KITTITAS COUNTY, *Respondent*, v. SKY ALLPHIN ET AL., *Appellants*.

Notice: PUBLISHED IN PART

Subsequent History: Review granted by, in part *Kittitas County v. Allphin, 187 Wn.2d 1001, 386 P.3d 1089, 2017 Wash. LEXIS 38 (Jan. 4, 2017)*

Prior History: [***1] Appeal from Kittitas Superior Court. Docket No: 13-2-00074-4. Judge signing: Honorable Scott R. Sparks. Judgment or order under review. Date filed: 02/27/2015.

ABC Holdings, Inc. v. Kittitas County, 187 Wn. App. 275, 348 P.3d 1222, 2015 Wash. App. LEXIS 891 (Apr. 23, 2015)

Counsel: *Leslie A. Powers*; and *Nicholas J. Lofing* (of *Davis Arneil Law Firm LLP*), for appellants.

Kenneth W. Harper and *Quinn N. Plant* (of *Menke Jackson Beyer LLP*); and *Gregory L. Zempel, Prosecuting Attorney*, and *Neil A. Caulkins, Deputy*, for respondent.

Judges: Authored by Robert E. Lawrence-Berrey. Concurring: Rebecca L. Pennell, Kevin M. Korsmo.

Opinion by: Robert E. Lawrence-Berrey

Opinion

[*358] [**1204]

¶1 LAWRENCE-BERREY, A.C.J. — In 2011, Kittitas County (County) issued a notice of violation and abatement (NOVA) to Chem-Safe Environmental Inc. and its parent company, ABC Holdings Inc. (collectively Chem-Safe), for storing and [*359] handling moderate risk waste without proper county permits. The Kittitas County Prosecuting Attorney's Office sought assistance from technical professionals at the Washington State Department of Ecology, and the deputy prosecutor and Ecology employees exchanged e-mails throughout the regulatory enforcement litigation.

¶2 Sky Allphin, Chem-Safe's president, then submitted a [***2] *Public Records Act (PRA)* request under *chapter 42.56 RCW*, seeking the County's records pertaining to the case, including its attorneys' e-mails and correspondence. The trial court reviewed the e-mails in camera and determined they were a product of litigation ongoing between the County and Mr. Allphin and were, therefore, exempt from production under the PRA.

¶3 Mr. Allphin argues the sealed e-mails are not attorney work product or attorney client privileged and, even if they are, the County waived any privilege when it exchanged the e-mails with Ecology. In the published portion of this opinion, we discuss the "common interest doctrine," an exception to the rule that the presence of a third party [**1205] to a communication waives a privilege. We hold that this doctrine applies here and the County did not waive any privilege by consulting with Ecology.

¶4 Mr. Allphin also argues (1) the County's exemption logs are inadequate, (2) the County violated the PRA when it initially withheld or redacted records and then subsequently produced those same records, (3) the County failed to provide the fullest assistance, (4) the County unlawfully withheld handwritten notes by Richard Granberg, and (5) the County abused the judicial [***3] process and this court should release the e-mails as a sanction. In the unpublished portion of this opinion, we agree with Mr. Allphin that the County wrongfully withheld six e-mails, but disagree with his remaining arguments. We therefore affirm in part, reverse in part, and remand for further proceedings.

[*360] FACTS

¶5 Chem-Safe operates a hazardous waste transport and

transfer facility in Kittitas County, Washington. Beginning in 2009 or 2010, the County and Ecology worked with Chem-Safe to develop operations and engineering plans that would comply with Washington's waste handling regulations. In December 2010, James Rivard, the environmental health supervisor for the Kittitas County Public Health Department (KCPHD), received letters from the Idaho Department of Environmental Quality. The letters said an Idaho disposal company sent three shipments of waste back to Chem-Safe because the contents of Chem-Safe's waste drums did not match the labels on the drums or Chem-Safe's paperwork.

¶6 Mr. Rivard inspected Chem-Safe's facility and observed moderate risk waste materials. Chem-Safe did not have a permit from KCPHD to collect moderate risk waste or operate a moderate risk waste facility. Chem-Safe [***4] also failed to properly label hazardous waste, had unsanitary drums, and lacked a secondary containment for their drums.

¶7 The County issued Chem-Safe a NOVA, which alleged Chem-Safe had operated a hazardous waste facility without a proper permit, required Chem-Safe to take a number of abatement actions, and required Chem-Safe to suspend all facility operations until it obtained a permit. Mr. Rivard copied his letter to Gary Bleeker, Ecology's facilities specialist lead; Wendy Neet, Ecology's solid waste inspector; and Richard Granberg, Ecology's hazardous waste specialist. The County issued a health order that incorporated the NOVA's findings and requirements.

¶8 Chem-Safe appealed the NOVA and the hearing examiner affirmed. Chem-Safe appealed to the superior court, which also affirmed and ordered Chem-Safe to submit a sampling plan and test its facility. Chem-Safe then [*361] appealed to this court. We upheld the NOVA and concluded Chem-Safe did not comply with the County's permitting ordinances. *See ABC Holdings, Inc. v. Kittitas County, 187 Wn. App. 275, 284-86, 289, 348 P.3d 1222, review denied, 184 Wn.2d 1014, 360 P.3d 817 (2015).*

¶9 Chem-Safe also brought a *42 U.S.C. § 1983* claim in federal court against the County, Ecology, Mr. Rivard, Mr. Granberg, Mr. Bleeker, and two other Ecology employees—Norman Peck with Ecology's toxics [***5] cleanup program, and his supervisor, Valerie Bound.

¶10 The Kittitas County Prosecuting Attorney's Office originally assigned Deputy Prosecutor Suzanne Becker to handle the Chem-Safe litigation. Deputy Prosecutor Zera Lowe later took over the case. The County's employees and Ecology's employees e-mailed one another and met in person throughout Chem-Safe's various appeals, and Ecology's employees generally acted in a consultative role with respect to the civil enforcement action. For example, Mr. Peck kept Mr. Rivard updated as to whether Chem-Safe had submitted a sampling plan, and discussed what the plan needed to include in order to meet both agencies' requirements. After Chem-Safe moved to stay the superior court's order, Ms. Lowe e-mailed Mr. Peck and asked for help responding to and gathering additional declarations. Mr. Peck e-mailed Chem-Safe's declarations to the other Ecology employees in order to coordinate a response, and also met with Ms. Lowe and Mr. Rivard.

¶11 On October 17, 2012, Mr. Allphin submitted a PRA request to the County requesting "[a]ll documentation, correspondence, pictures, [**1206] court records and emails to and from Kittitas County Public Health and Kittitas County Prosecutors [***6] Office regarding Chem-Safe Environmental, Inc. dating from January 1, 2010 to current."[1] Clerk's Papers (CP) at 70. Mr. Allphin sent Ecology a similar [*362] request, seeking all of Ecology's documents regarding Chem-Safe. This request included all communications between Ecology and the Kittitas County Prosecuting Attorney's Office while working on the Chem-Safe case.

¶12 Ms. Lowe and legal secretary Angela Bugni were responsible for responding to Mr. Allphin's PRA request. When Ms. Lowe learned Mr. Allphin had also requested records from Ecology, she asked Ecology's public records officer not to release any records containing communications between the County's legal counsel and Ecology employees that would disclose legal strategy or the attorneys' thought processes. Ecology's records officer advised Ms. Lowe that Ecology would not release the records until the County sought court protection. However, Ecology inadvertently released a few e-mails between Ms. Becker (the former deputy prosecutor) and Ecology that Ms. Lowe believed [***7] contained attorney work product.

¶13 The County filed a complaint in the superior court naming Mr. Allphin, Chem-Safe, and Ecology as respondents. The complaint sought a declaratory judgment that the County and Ecology's e-mails were attorney work product and attorney client privileged and thus exempt from production under the PRA. The County moved the superior court to review the records in camera and also moved for a temporary restraining order (TRO) enjoining Ecology from releasing the challenged records until the court had the chance to review them.

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[1] Mr. Allphin also submitted two more PRA requests on November 21, 2012, and January 29, 2013. These requests were not voluminous, and the County responded to these requests without controversy.

¶14 At the hearing, the County handed up one sealed envelope with the caption "DOCUMENTS SUBMITTED FOR IN CAMERA REVIEW." CP at 781. The cover sheet identified 11 individual e-mails and identified the sender, recipients, and date and time at which the e-mail was sent.

¶15 The superior court reserved ruling at the hearing and later issued a memorandum decision. The court reviewed the records in camera and determined the e-mails were a product of litigation ongoing between the County and Mr. Allphin and were, therefore, exempt from production **[*363]** under the PRA. The superior court also held the fact that the County e-mailed Ecology during the litigation did not waive **[***8]** this privilege, given that the County and Ecology worked cooperatively to enforce the environmental laws and were thus on the same "legal team." CP at 788.

¶16 In December 2013, the superior court incorporated its memorandum decision into a final order, dissolved the TRO, and permanently enjoined Ecology from producing the 11 e-mails it reviewed in camera. The court ordered Ecology to produce the e-mails it previously withheld under the TRO. The court found that sealing satisfied the *Ishikawa*[2] factors, then sealed the e-mails.

¶17 In March 2014, Mr. Allphin filed an amended answer and brought counterclaims against the County, alleging the County failed to provide the fullest assistance and unlawfully withheld nonexempt records. The County obtained new counsel. Throughout the next several months, the County and Mr. Allphin exchanged a number of letters discussing the adequacy of the County's PRA response.

¶18 In one of his letters, Mr. Allphin listed 21 additional e-mails from the County's exemption logs that he wanted the court to review in camera. Mr. Allphin disagreed with the County's claim that these e-mails were work product and thus exempt from disclosure. The County agreed to assemble the 21 e-mails **[***9]** for a second in camera review. Mr. Allphin and the County continued to fine tune the list of records the County would submit for the second in camera review.

¶19 The County and Mr. Allphin both moved for summary judgment. At the hearing, the County handed the court a sealed envelope containing 21 e-mails. The court **[**1207]** reviewed them and determined they contained attorney work product and were thus exempt from production under the PRA. The court ruled the County and Ecology exchanged the e-mails in response to the ongoing Chem-Safe **[*364]** litigation, and that the County and Ecology shared a common interest in the enforcement of state and local environmental regulations. The court also found the County's initial claims of exemption were lawful, that the County provided its fullest assistance, and that Mr. Granberg's handwritten notes, i.e., the "smoking gun memorandum," was not a county record and, therefore, the County had no duty to disclose it. CP at 2982. The court then granted summary judgment for the County. The court then sealed the e-mails and granted final judgment for the County. Mr. Allphin appeals.

ANALYSIS

A. STANDARD OF REVIEW

¶20 This court reviews public agency actions challenged under the PRA de novo. **[***10]** *RCW 42.56.550(3)*. We also review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Andrews v. Wash. State Patrol, 183 Wn. App. 644, 650, 334 P.3d 94 (2014), review denied, 182 Wn.2d 1011, 343 P.3d 760 (2015)*. Summary judgment is proper where the pleadings and affidavits show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*. In reviewing a motion for summary judgment, we construe the facts and reasonable inferences in favor of the nonmoving party. *Andrews, 183 Wn. App. at 650-51*. When the record consists entirely of documentary evidence and affidavits, we stand in the same position as the trial court and generally are not bound by the trial court's factual findings. *Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252-53, 884 P.2d 592 (1994)* (plurality opinion).

B. SEALED RECORDS FROM THE IN CAMERA REVIEW HEARINGS

[1, 2] ¶21 The PRA is a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)*. It requires all state **[*365]** and local agencies to disclose any public record on request, unless the record falls within certain narrowly construed exemptions. *RCW 42.56.070(1), .030*. It is the agency's burden to show a redacted or withheld record was exempt. *RCW 42.56.550(1)*. Where the agency possesses undisclosed responsive records, it "must explain and justify any withholding, in whole or in part, of any requested public records." *Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 432, 327 P.3d 600 (2013)*. "Silent withholding is prohibited." *Id.*

1. *The 21 e-mails from the second* **[***11]** *in camera review hearing*

¶22 Mr. Allphin argues that the 21 e-mails the trial court sealed following the second in camera review hearing are not exempt under the PRA because they do not contain attorney

[2] *Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).*

work product and are not attorney client privileged.

[3-5] ¶23 Under RCW 42.56.290, an agency does not have to disclose "[r]ecords that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." This includes communications containing attorney work product. *Block v. City of Gold Bar, 189 Wn. App. 262, 279-80, 355 P.3d 266 (2015), review denied, 184 Wn.2d 1037, 379 P.3d 951 (2016).* The attorney client privilege similarly protects confidential communications between an attorney and a client from discovery or public disclosure. *Mechling v. City of Monroe, 152 Wn. App. 830, 852, 222 P.3d 808 (2009); RCW 5.60.060(2)(a).*

¶24 Attorney work product includes "documents and other tangible things that (1) show legal research and opinions, mental impressions, theories, or conclusions of the attorney or of other representatives of a party; (2) are an attorney's written notes or memoranda of factual statements or investigation; and (3) are formal or written statements **[*366]** of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation." *Limstrom v. Ladenburg, 136 Wn.2d 595, 611, 963 P.2d 869 (1998).*[3] Work **[**1208]** product documents need **[***12]** not be prepared personally by counsel; they can be prepared by or for the party or the party's representative as long as they are prepared in anticipation of litigation. *See* CR 26(b)(4).

¶25 Mr. Allphin argues two of the e-mails in the second index for in camera review—numbers 2 and 21—were not sent or received by attorneys at all, but were exchanged between Mr. Rivard and Mr. Peck, neither of whom are attorneys. However, number 2 on the index is an e-mail that Mr. Rivard sent to Mr. Peck *and* Ms. Lowe. *See* CP at 3239. The index sheet simply fails to list Ms. Lowe as a recipient. Number 21 on the index is an e-mail Mr. Rivard sent only to Mr. Peck. However, the substance of Mr. Rivard's e-mail is a forwarded message from Ms. Lowe, who asked Mr. Rivard to pass along the message to Mr. Peck. *See* CP at 3389.

[6, 7] ¶26 Mr. Allphin also argues the 21 e-mails, while originating **[***13]** from an attorney, do not constitute attorney work product because they are not "mental impressions, thoughts, and theories," and are therefore not exempt under the PRA. Br. of Appellant at 24. However, under *Limstrom* and *Koenig*, the e-mails need only contain statements of fact gathered by an attorney or prepared by or for the party or the party's representative in anticipation of litigation. Without specifically describing the substance of the actual e-mails, it is clear these e-mails contain statements of fact and legal strategies prepared by and for the various employees **[*367]** of the County and Ecology in response to the Chem-Safe litigation.[4]

2. *Waiver*

¶27 Mr. Allphin argues the County waived any protected, privileged, or confidential right to the e-mails because its employees sent them to Ecology employees throughout the Chem-Safe litigation. Mr. Allphin specifically challenges the trial court's finding that the County did not waive these privileges due to the fact that the County and Ecology worked cooperatively to enforce the environmental laws and were thus on the same "legal team." CP at 788.

[8, 9] ¶28 Generally, a party waives the attorney work product privilege if that party discloses documents to other persons with the intention that an adversary can see the documents. *Limstrom v. Ladenburg, 110 Wn. App. 133, 145, 39 P.3d 351 (2002).* Similarly, to qualify for attorney client privilege, a communication must be made in confidence. *Morgan v. City of Federal Way, 166 Wn.2d 747, 757, 213 P.3d 596 (2009).* The presence of a third person during the communication waives the privilege, unless the third person is necessary for the **[***15]** communication or has retained the attorney on a matter of "'common interest.'" *Id.* (quoting *Broyles v. Thurston County, 147 Wn. App. 409, 442, 195 P.3d 985 (2008)).*
[*368]

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[3] *Limstrom* held the broad civil discovery rule, CR 26(b)(4), applies when determining whether records are exempt from production under RCW 42.56.290, rather than the much narrower criminal discovery rule, CrR 4.7(f)(1), which protects documents from disclosure under the PRA only "'to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies.'" ***Koenig v. Pierce County, 151 Wn. App. 221, 230, 211 P.3d 423 (2009)*** (quoting CrR 4.7(f)(1)).

[4] Mr. Allphin argues the e-mails were not marked "confidential" or "work product" to protect from disclosure. Br. of Appellant at 24. The record does not support this argument. The first e-mail to which Mr. Allphin cites for this argument contains a disclaimer that begins, in capital letters, with "CONFIDENTIALITY NOTICE." CP at 2237. The 21 sealed e-mails all contain similar disclaimers. Mr. Allphin also argues that even assuming the e-mails are work product, this court should order the County to produce them under CR 26(b)(4)'s exception to the work product privilege. However, CR 26(b)(4) provides that **[***14]** a party seeking attorney work product may obtain it *only* after showing that he or she "has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Mr. Allphin fails to explain why he meets either of these requirements.

¶29 "The 'common interest' doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group." *Sanders v. State, 169 Wn.2d 827, 853, 240 P.3d 120 (2010)*; *see also C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 716, 985 P.2d 262 (1999)*. The common interest doctrine is an **[**1209]** exception to the general rule that the voluntary disclosure of a privileged attorney client or work product communication to a third party waives the privilege. *Avocent Redmond Corp. v. Rose Elecs., Inc., 516 F. Supp. 2d 1199, 1202 (W.D. Wash. 2007)*.

[10, 11] ¶30 "The common interest or joint defense privilege applies where (1) the communication was made by separate parties in the course of a matter of common interest or joint defense; (2) the communication was designed to further that effort; and (3) the privilege has not been waived." *Id. at 1203*. 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.*; *see also In re Pac. Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012)* ("[T]he parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten.").

[12, 13] ¶31 The common interest doctrine applies in the PRA context. *Sanders, 169 Wn.2d at 854*. "[D]ocuments that fall **[***16]** under the common interest doctrine are not discoverable in civil cases and so are exempt under the controversy exemption." *Id.* The *Sanders* court held the common interest doctrine exempted certain documents from disclosure under the PRA even if the Attorney General's Office (AGO) shared those documents with other agencies.[5] *Id. at 840, 853-54*.
[*369]

¶32 In contrast, in *Morgan*, a municipal court judge who was the subject of a hostile work environment investigation e-mailed the city attorney and complained the investigation created a hostile work environment for him. *Morgan, 166 Wn.2d at 752*. The judge then forwarded that e-mail message to the private e-mail address of one of the city council members. *Id.* The local newspaper filed a PRA request for the investigator's report, and the judge moved to prevent its release. *Id.* The court held the attorney client privilege did not apply to the e-mail the judge sent to the city attorney and the e-mail was therefore not exempt under the PRA. *Id. at 757*. This was because the judge later forwarded that e-mail to the city council **[***17]** member and the judge failed to demonstrate a common legal interest between him and the city council member. *Id.*

¶33 Here, although the County and Ecology did not have a joint prosecution agreement, a written agreement was not required because the record demonstrates the two agencies agreed to undertake a joint/common cause in the regulatory enforcement litigation against Chem-Safe. At the very beginning of the case, Ms. Becker e-mailed Mr. Granberg, Mr. Rivard, and Mr. Bleeker and scheduled a meeting to discuss Chem-Safe's compliance with Washington's permitting, transportation, storage, and disposal regulations. Throughout the litigation, the County asked Ecology questions about Chem-Safe's testing plans and about Chem-Safe's engineering and technical arguments. The record demonstrates Ecology was "acting in a consultative role with respect to the civil enforcement action."[6] CP at 1412.

¶34 Mr. Allphin argues that the County and Ecology did not have a common interest because the County sued Ecology to prevent Ecology from releasing the records, thus **[*370]** making Ecology an opposing party for purposes of waiver. This argument conflates the two lawsuits. While the County listed Ecology as a respondent in *this case* in order to prevent Ecology from producing exempt documents, the County and Ecology were on the same legal team for purposes of the underlying regulatory enforcement action, which is separate from this PRA case.
[1210]**

¶35 Mr. Allphin also argues that the common interest doctrine is not a statutorily listed PRA exemption and, therefore, the County cannot use it as a basis for withholding the e-mails. The *Sanders* court expressly rejected this argument, finding that the common interest doctrine is merely a common law exception to waiver of privilege that applies when parties share a common interest in litigation. *Sanders, 169 Wn.2d at 853*.

¶36 While it is true that no attorney client relationship existed between the county prosecutor and Ecology, we hold the lack of such a relationship **[***19]** does not prevent the county

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[5] The *Sanders* court never explained what these documents were, what other agencies the AGO shared them with, or the nature of the relationship between the AGO and these other agencies. *See Sanders, 169 Wn.2d at 837-41*.

[6] In fact, this collaborative relationship between the County and Ecology is statutorily required. *RCW 70.105.005(10)* provides that "because local conditions vary substantially in regard to the quantities, risks, and management opportunities available for such wastes, local government is the appropriate level of government to plan for **[***18]** and carry out programs to manage moderate-risk waste, *with assistance and coordination provided by* [*Ecology*]." (Emphasis added.)

prosecutor from seeking assistance from Ecology's technical professionals in enforcing the state and county environmental laws. Releasing these records would force government attorneys to forgo communicating with other law enforcement professionals during litigation due to the fear that their opponents will obtain their mental impressions and ideas.

¶37 Because the communications between the County and Ecology throughout the Chem-Safe litigation were protected under the work product and attorney client privileges, we conclude the trial court properly sealed the sets of 11 and 21 e-mails.

¶38 A majority of the panel has determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record in accordance with *RCW 2.06.040*.

ADDITIONAL FACTS

A. THE COUNTY'S RESPONSE TO MR. ALLPHIN'S PRA REQUEST

¶39 After Mr. Allphin submitted his PRA request, Ms. Lowe and Ms. Bugni first transmitted his request to the county departments they believed might have records. They then searched the prosecuting attorney's office's physical files. Next, they searched the office's network [***20] drive using key words. Also using key words, Ms. Bugni searched her e-mail account and Ms. Lowe searched both her own and Ms. Becker's e-mail accounts. The two then got permission from the county commissioners to search the County's archival system to find deleted e-mails. Through March 20, 2013, the County expended roughly 357 hours on Mr. Allphin's PRA response, which did not include the 115 hours spent addressing attorney work product and attorney client privilege redaction issues. Ms. Bugni personally spent over 200 hours working on the County's response.

¶40 At KCPHD, Mr. Rivard received the copy of Mr. Allphin's PRA request from Ms. Lowe. Like Ms. Lowe and Ms. Bugni, Mr. Rivard searched his office's physical files and used keywords to search the shared files on the office's computer server, his computer, and his e-mail. Mr. Rivard reviewed every e-mail he sent and received from January 1, 2010 to October 17, 2012. Mr. Rivard eventually realized some of the e-mails in his account did not contain attachments. He contacted the County's information technology department about the issue, which told him the County's archiving system changed and he needed to find the attachments in a separate [***21] archival system. After that, Mr. Rivard went to the separate archival system to print the attachments to his e-mails. Mr. Rivard reviewed his e-mails to ensure he had included all of the pages and attachments and then sent them to Ms. Lowe, so that she could send them to Mr. Allphin. Mr. Rivard also searched the County's digital camera and memory card. Mr. Rivard expended roughly 180 hours on Mr. Allphin's PRA response.

¶41 Several days after Mr. Allphin submitted his PRA request, Ms. Lowe sent Mr. Allphin a letter stating the County needed to provide the requested documents in installments due to the large number of records the County needed to retrieve and review. Ms. Lowe said the County would provide the first installment on November 8, 2012, and would then continue providing scheduled installments until it fulfilled Mr. Allphin's request.

¶42 The County then produced records in the following installments:

- November 8, 2012: County disclosed a list of 88 different court records, totaling 1,786 pages.[7]
- December 21, 2012: County produced 1,022 pages.
- January 23, 2013: the County produced 1,481 pages.
- February 27, 2013: the County produced 850 pages. In the letter, Ms. Lowe noted that the [***22] County would include a detailed log if it withheld or redacted any documents, and also noted that the County retained the right to seek court protection of exempt records.
- March 27, 2013: the County produced 2,400 pages.
- March 28, 2013: the County produced 1,007 pages, some of which were redacted or withheld, and an exemption log.
- April 2, 2013: the County produced 72 pages, some of which were redacted or withheld, and an exemption log.
- April 26, 2013: the County produced 131 pages and 34 phone logs.
- May 24, 2013: the County produced 2,320 pages, including 111 e-mails without any redaction, 22 with some portions redacted. The County withheld 11 e-mails because they were either work product or attorney client privileged. The County included an exemption log.
- June 19, 2013: the County produced 10,500 pages.
- July 26, 2013: the County produced 44 e-mails without redaction.
- August 26, 2013: the County produced 28 e-mails, some of which had portions redacted. The County included an exemption log.
- September 30, 2013: the County produced 15 e-mails without redaction, three with some part redacted, and

[7] On November 28, Ms. Lowe sent Mr. Allphin a letter in which she asked if Mr. Allphin wanted the court records, asked how he wanted the records produced, and asked from which specific departments he sought records.

withheld 2. The County included an exemption log.

• October 28, 2013: the County [***23] produced 17 e-mails without redaction, and withheld 18 e-mails. The County included an exemption log.
• November 18, 2013: the County produced 7 e-mails with redactions and included an exemption log.
• December 23, 2013: the County produced 4 e-mails with no redactions, 5 e-mails with redactions, and withheld 10 e-mails. The County attached an exemption log.
• January 13, 2014: the County produced 52 e-mails with no redaction and 3 e-mails with redaction. The County included an exemption log.

¶43 Ms. Lowe retired in mid-2013 and Deputy Prosecutor Paul Sander assumed responsibility for responding to the PRA request. On January 28, 2014, Mr. Sander sent Mr. Allphin a letter advising him that he had concluded his search for records and the January 13, 2014 installment was the final installment.

B. LITIGATION PRIOR TO THE FIRST IN CAMERA REVIEW HEARING

¶44 After moving for the TRO, the County discovered Mr. Allphin's former counsel would not be back from vacation until the day of the hearing, [***24] so Ms. Lowe reset the hearing for later in the week. The day before the hearing, Chem-Safe's new counsel e-mailed Ms. Lowe and asked for a continuance, which Ms. Lowe declined. Later that day, Mr. Allphin moved to disqualify Judge SCOTT SPARKS and Judge FRANCES CHMELEWSKI and submitted affidavits of prejudice for each judge—one from Mr. Allphin, and one from another one of Chem-Safe's officers.[8] The day of the hearing, Judge CHMELEWSKI called the case, noted the existence of the two affidavits, and ruled a visiting judge would hear the case.

¶45 Visiting Judge BLAINE GIBSON found the affidavit filed against Judge SPARKS was invalid and the case should proceed before Judge SPARKS. Judge Gibson extended the TRO until Judge SPARKS could review the records in camera. The County stated it no longer sought to restrain the records Ecology had already released.

C. COUNTY ACKNOWLEDGES ERRORS FROM IN CAMERA REVIEW HEARING

¶46 After Mr. Allphin filed his amended answer, the County, through new counsel, sent Mr. [***25] Allphin a letter concerning the County's production of the remainder of the requested records. In this letter, the County stated many of the records it had listed on the exemption log were duplicates. The County also acknowledged the index of 11 e-mails it had submitted to the court at the first in camera review hearing contained errors. The County told Mr. Allphin the e-mail identified as number 7 on the index—purportedly a July 18, 2011, 7:31 a.m. e-mail from Mr. Rivard to Ms. Becker—was erroneously designated on the index. The e-mail the County actually submitted as number 7 on the index was an e-mail from Mr. Rivard to Ms. Lowe and Mr. Peck, sent on July 19, 2012, at 12:46 p.m.

¶47 The County also stated the envelope contained eight additional e-mails that were not listed on the index. The reason the index did not identify these e-mails was because they were contained in e-mail chains, and the index only listed the first e-mail in the chain. Mr. Allphin responded to the County's letter and agreed the County produced some of the records it claimed to have produced, but disagreed that the County had produced others.

¶48 The County moved to amend the superior court's final order from the first [***26] in camera review hearing. In its motion, the County acknowledged the errors in the index it had attached to the envelope. The County asked the court to issue an amended order that correctly listed the e-mails the County submitted for in camera review. The County also asked the court to review an additional e-mail it had failed to provide the court at the first in camera review hearing. Mr. Allphin argued the County made material misrepresentations and abused the judicial process, and asked the court to release the records as a sanction and award him fees and costs. The court determined the record was adequate and denied the County's motion.

¶49 Mr. Allphin sent the County a letter describing 11 e-mails that were still possibly missing.[9] The County said it would look into these missing e-mails. The County also produced the 8 e-mails it had failed to list on the index because they were buried in e-mail chains, and also produced the 1 additional e-mail it failed to provide the court. The County acknowledged Ecology produced these e-mails after the in camera review hearing because they were not included in the court's sealing order, thereby waiving the work product and attorney client privileges. [***27]

¶50 The County's new counsel forwarded Mr. Allphin's e-mail about the 11 possibly missing e-mails to Ms. Bugni, and Ms. Bugni searched for them in the County's archival e-mail

[8] Kittitas County has two superior court judges. When both judges are precluded from hearing a case, the court administrator finds a visiting judge to preside over the case, usually from Yakima County.

[9] These 11 e-mails are different than the 11 e-mails the court reviewed at the first in camera review hearing.

system. Ms. Bugni forwarded the list to KCPHD so it could check its archives as well. Ms. Bugni and KCPHD were able to find several of the missing e-mails, and also found three e-mails with time and date stamps that were similar, but not identical, to e-mails Mr. Allphin claimed were missing.

¶51 The County told Mr. Allphin it had located several of the 11 "possibly missing" e-mails and produced them, and also advised it had previously disclosed 4 of them. The County also told Mr. Allphin it was still unable to locate the remainder of the possibly missing e-mails, but was able to locate three e-mails with similar delivery dates and times. The County produced these three e-mails. The County also produced a copy of handwritten notes between Mr. Granberg and Mr. Rivard.

¶52 Mr. Allphin responded that he was certain the other "possibly missing" e-mails existed and asked the County to check again. Ms. Bugni searched again **[***28]** and was unable to locate them on any County system.

ADDITIONAL ANALYSIS

A. ADEQUACY OF EXEMPTION LOGS

¶53 Mr. Allphin argues the County's exemption logs are inadequate because none of them listed the common interest doctrine as a basis for withholding the records.

¶54 When an agency withholds or redacts records, its response "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)*. The agency must do more than identify the record and the specific exemption—it must explain how the exemption applies to the record. *Block, 189 Wn. App. at 282* (quoting *City of Lakewood v. Koenig, 182 Wn.2d 87, 94, 343 P.3d 335 (2014)*). "The level of detail necessary for a requestor to determine whether an exemption is properly invoked will depend upon both the nature of the exemption and the nature of the document or information." *City of Lakewood, 182 Wn.2d at 95*. "An agency violates the PRA by failing to provide an adequate explanation." *Block, 189 Wn. App. at 283*.

¶55 Here, the County's exemption logs all specifically identify the redacted or withheld e-mails by author, recipients, date, time, and number of pages. The logs also contain a column that provides an accurate description of the e-mails' contents. For example, number 84 on the exemption **[***29]** log states the record being withheld was an "E mail to Becker re CSE operations plan—questions re type of permit." CP at 668. The logs state the County redacted or withheld the e-mails under the controversy exemption, *RCW 42.56.290*, and list "[a]ttorney work product" as the basis for which the e-mails would not be discoverable under the civil rules. CP at 668. It was also apparent the "controversy" at issue was the regulatory enforcement action surrounding the NOVA. *Cf. Sanders, 169 Wn.2d at 846* (holding the AGO's exemptions logs were inadequate because they claimed the controversy exemption for numerous records without specifying details such as the controversy to which each record was relevant). Given that the common interest doctrine is merely a common law exception to waiver and not a separate exemption, the County's explanation that the e-mails were "work product" was sufficient to explain why the County was withholding them. Between this explanation and the County's description of each e-mail's contents, we conclude the County's exemption logs were adequate.

B. INITIAL WITHHOLDING AND SUBSEQUENT PRODUCTION

¶56 Mr. Allphin argues the County violated the PRA when it initially withheld e-mails and then subsequently produced them.

¶57 If an agency produces **[***30]** documents after the requester files suit, this is not an ipso facto admission that the initial withholding of the documents was wrongful. *Sanders, 169 Wn.2d at 849*. "Rather, the appropriate inquiry is whether the records are exempt from disclosure." *Id.* "If they are exempt, the agency's withholding of them was lawful and its subsequent production of them irrelevant." *Id. at 849-50*. "If they are nonexempt, the agency wrongfully withheld the records and the appropriate penalty applies for the numbers of days the record was wrongfully withheld—in other words, until the record was produced." *Id. at 850*. An agency is permitted to maintain certain documents are exempt but also produce them anyway if the agency determines their production would be innocuous. *Id. at 849*.

¶58 Here, the County initially withheld or redacted many e-mails because they were attorney work product or attorney client privileged. After Ecology inadvertently released many of these e-mails, the County no longer claimed the e-mails were exempt and subsequently produced them. The County argues it did not violate the PRA because it continually stayed in a "cooperative dialogue" with Mr. Allphin. Br. of Resp't at 39. But this is not a recognized statutory exemption. If the County withheld **[***31]** nonexempt e-mails, it violated the PRA.

1. *March 27-28, 2013 exemption log*

¶59 Mr. Allphin argues the County improperly withheld a chain of six e-mails on its March 27-28, 2013 exemption log. *See* CP at 1569-70. The County withheld these six e-mails on the basis that they were "[a]ttorney-client privileged e mail communications between legal counsel and client." CP at

1566. The senders and recipients of these e-mails were Brenda Larsen, who is the Kittitas County fire marshal, Alan Crankovich, who is on the Kittitas County Board of Commissioners, Barry Kerth, a deputy fire marshal, and Mr. Rivard. None of these individuals are attorneys. This chain of six e-mails was therefore not exempt from disclosure under RCW 42.56.290 and the County violated the PRA when it initially withheld and subsequently produced them. Thus, a per diem penalty applies for the numbers of days these e-mails were wrongfully withheld.[10]

2. *April 2, 2013 exemption log*

¶60 Mr. Allphin argues the County's April 2, 2013 exemption log lists a number of e-mails that do not contain work product or attorney client communications [***32] and, therefore, the County wrongfully withheld these e-mails. Mr. Allphin does not identify specific e-mails, but cites broadly to "CP at 2236-2479." Br. of Appellant at 33. We have reviewed every e-mail to which Mr. Allphin cites and, with the exception of two, a deputy prosecutor (either Ms. Becker or Ms. Lowe) was either the sender or a recipient on every one. Accordingly, all of these e-mails were exempt from disclosure under the attorney work product privilege and/or the attorney client privilege and the County did not violate the PRA by subsequently producing them.

¶61 There are two e-mails in which a deputy prosecutor was not the sender or a recipient. The first is from Krystal Rodriguez to Mr. Peck, sent on July 18, 2011 at 7:43 a.m. *See* CP at 2274. But there is no indication the County ever actually withheld this e-mail, given that it is not listed in either of the County's exemption logs. The second is from Mr. Peck to Mr. Rivard and Ms. Bound, sent on June 14, 2012 at 8:02 a.m. *See* CP at 2473-74. This e-mail is listed as number 93 on the County's April 2, 2013 exemption log. *See* CP at 846. But when the County produced this chain of e-mails, it did *not* redact this particular e-mail. Rather, it produced this e-mail and redacted [***33] a separate e-mail in the chain, to which Ms. Lowe was a recipient. *See* CP at 865. Thus, the County's subsequent production of these e-mails did not violate the PRA.

3. *Over-redaction*

¶62 Mr. Allphin argues the County over-redacted a number of e-mails.[11] He lists two e-mails in particular. The first is from Mr. Rivard to Ms. Lowe and Mr. Peck that said, "It is ok with me if you are [at the meeting] Norm." CP at 1754. The second is from Mr. Peck to the AGO and Ms. Becker and was in response to the AGO's legal opinion regarding whether their communications were privileged. The e-mail said, "Very helpful. Thanks, Mary Sue. Have a great evening, and rest of your week. (Hopefully I won't pester you any further[.])." CP at 1743.

¶63 *RCW 5.60.060(2)(a)* provides that *any* attorney client communication is confidential. In light of our holding that the common interest doctrine protects all confidential legal communications pertaining to Ecology and the County's joint effort in the regulatory enforcement action, we conclude [***34] the County did not violate the PRA by redacting these e-mails.

C. FULLEST ASSISTANCE

¶64 Mr. Allphin argues the County violated the PRA by delaying its records response and failing to provide the fullest assistance.

¶65 Consistent with RCW 42.56.100, agencies must adopt rules that "provide for the fullest assistance to inquirers and the most timely possible action on requests for information," but still "prevent excessive interference with other essential functions of the agency." However, "administrative inconvenience or difficulty does not excuse strict compliance with the [PRA]." *Zink v. City of Mesa, 140 Wn. App. 328, 337, 166 P.3d 738 (2007).* "In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an 'excessive interference' with the agency's 'other essential functions.'" WAC 44-14-04003(2). "The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others." Id.

¶66 Here, the County did not delay fulfilling the records request, nor did it fail to provide assistance in a timely manner. On October 24, 2012—five business days after Mr. Allphin submitted his request—Ms. Lowe gave Mr. Allphin a detailed explanation about how [***35] the County would respond to his request. Ms. Lowe and Ms. Bugni then worked together to send Mr. Allphin installments on a monthly basis throughout the rest of 2012, through 2013, and until Mr. Sander closed the request in 2014. Whenever the deputy prosecuting attorney did not anticipate being able to send the installment by the promised date because of illness or technical difficulties accessing the County e-mail system, Ms. Bugni would communicate this with Mr. Allphin.

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[10] According to Mr. Allphin's declaration, the County eventually produced these six e-mails on July 3, 2013, or 98 days after initially withholding them. *See* CP at 1469.

[11] RCW 42.56.210(1) provides that "the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought."

¶67 The prosecuting attorney's office expended roughly 357 hours on Mr. Allphin's PRA response, which did not include the time spent addressing attorney work product and attorney client privilege issues. Ms. Bugni spent over 200 hours working on the prosecuting attorney's office's response, and Mr. Rivard spent 180 hours on KCPHD's response. Both offices were short-staffed, and Ms. Lowe, Ms. Bugni, Mr. Rivard, and Mr. Sander had to balance responding to a large request with their other official duties.

¶68 In fact, most of the delay in the initial stages of litigation was caused by the fact that Mr. Allphin filed affidavits of prejudice against both of the judges in a two-judge county. At the TRO hearings, visiting Judge Gibson [***36] noted that Mr. Allphin had nothing to complain about in terms of the delay, given that the case would have been much further along if he had not filed two affidavits. Judge Gibson also found the County endeavored "to resolve the matter quickly and expeditiously," and that "the delays that have resulted here have—primarily have been caused by the fact that the defendants filed two affidavits." Report of Proceedings at 131-32. We conclude the County did not delay its records response, nor did it fail to provide the fullest assistance.

D. MR. GRANBERG'S HANDWRITTEN NOTES

¶69 Mr. Allphin argues the County possessed Mr. Granberg's handwritten notes, which he describes as the "smoking gun memorandum," at the time he submitted his PRA request. Br. of Appellant at 47. He contends the County intentionally withheld these notes until it used them against him in the federal lawsuit.

¶70 "An agency is only required to provide access to public records it has or has used." *WAC 44-14-04004(4)(a)*. "An agency must only provide access to public records in existence at the time of the request. ... [I]f a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive [***37] to the request and need not be provided." *Id.*

¶71 The record demonstrates Ecology—not the County—possessed Mr. Granberg's handwritten notes at the time Mr. Allphin submitted his PRA request. Mr. Rivard (a County employee) and Mr. Granberg (an Ecology employee) worked together to inspect Chem-Safe's facility. Mr. Rivard sent Mr. Granberg an e-mail on March 7, 2011, to which he attached two color photographs of chemical drums and nothing else.[12] Mr. Granberg then took notes based off of these photographs. Ecology was the only agency that had a copy of Mr. Granberg's notes, until Ecology sent the County a compact disc containing records that Ecology had given Mr. Allphin. This happened after Mr. Allphin filed his PRA request with the County and, therefore, the County was not required to produce it.

¶72 Mr. Allphin argues the County possessed Mr. Granberg's notes at the time of Mr. Allphin's PRA request because the notes were transmitted from the County's copier to a County employee and then forwarded to an Ecology employee in 2011. [***38] To support this argument, Mr. Allphin cites to his declaration. However, his declaration says nothing about a copier of any kind, and simply repeats that Mr. Rivard sent Mr. Granberg the notes in the March 7, 2011 e-mail.

¶73 Mr. Allphin also cites to the County's filings in federal court, which stated that on March 7, 2011, Mr. Granberg gave Mr. Rivard handwritten notes based on Mr. Granberg's review of photographs of Chem-Safe's facility. *See* CP at 1955-56, 1965-66. The County included this in its filing because it initially believed the March 7, 2011 e-mail included Mr. Granberg's notes based on one of Mr. Allphin's earlier declarations. Based on all of the evidence in the record, reasonable minds could not differ that the County did not possess Mr. Granberg's notes at the time Mr. Allphin filed his PRA request. We conclude the County did not wrongfully withhold Mr. Granberg's handwritten notes.

E. MR. ALLPHIN'S REQUEST TO UNSEAL THE 11 E-MAILS AS A SANCTION

¶74 Mr. Allphin argues the County abused the in camera review process at the September 9, 2013 hearing by including e-mails in the envelope that did not match the accompanying index. Mr. Allphin asks this court to release the 11 e-mails as a sanction, regardless [***39] of their PRA exemption status. Mr. Allphin cites *RCW 2.28.010(3)*, which gives Washington courts power "[t]o provide for the orderly conduct of proceedings before it or its officers," and *Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008)*, which is a case about a vexatious litigant who filed multiple frivolous lawsuits.

¶75 Mr. Allphin is correct that the e-mails the County submitted in the envelope at the first in camera review hearing did not correspond to the e-mails the County listed on the index. The County argues that this was a mutual mistake, that the parties spoke past one another at the hearing, and that it sent Mr. Allphin a letter and moved the trial court to clarify the ruling when it realized its error.

¶76 It is difficult to see how this was a "mutual mistake" when the County prepared the envelope, prepared the index, and was the only party with access to the 11 e-mails.

[12] Ms. Bugni also declared she used the County's archival system to search for the March 7, 2011 e-mail and the attachment contained two photographs but no handwritten notes.

However, in this case, the County's error did not tangibly harm Mr. Allphin. Because the County included the eight extra e-mails in the envelope but did not list them on the index, the trial court did not include those e-mails in its sealing order. Because of this, Ecology later produced them to Mr. Allphin. Thus, the County's failure to list the e-mails on the index actually *benefitted* [***40] Mr. Allphin.

¶77 In addition, the parties agreed to include the July 19, 2012, 12:46 p.m. e-mail the County had erroneously put in the envelope at the first in camera review hearing on the list of 21 e-mails for the court to review at the second in camera hearing. The trial court ultimately determined this e-mail was exempt from disclosure. There is no evidence in the record that the e-mail the County originally designated as number 7 on the index—from Mr. Rivard to Ms. Becker on July 18, 2011 at 7:31 a.m.—ever actually existed. The parties do not discuss it in any of their subsequent correspondence, and it is not listed on any of the County's exemption logs. Because the County's error did not actually harm Mr. Allphin, we reject his invitation to unseal the 11 e-mails the trial court sealed at the first in camera review hearing as a sanction.

F. COSTS AND PER DIEM PENALTY

¶78 Mr. Allphin requests costs, including reasonable attorney fees, incurred on appeal. Under RCW 42.56.550(4), a party that prevails against an agency in an action under the PRA is entitled to an award of "all costs, including reasonable attorney fees, incurred in connection with such legal action." When a party seeking disclosure under the [***41] PRA prevails with respect to some but not all of the requested documents, costs and attorney fees should be awarded only in relation to the documents or portions that the court requires to be produced, and not to any documents or portions the court finds to be exempt from production. *Sanders, 169 Wn.2d at 867, 870.*[13] Mr. Allphin prevailed very narrowly and is entitled only to an award of costs and attorney fees reasonably incurred in obtaining the six e-mails located at CP 1569-70.

¶79 We direct our court commissioner to determine the appropriate cost and attorney fee award for those costs Mr. Allphin incurred on appeal relating to these six e-mails. Consistent with RAP 18.1(i), we direct the trial court to determine the appropriate cost and attorney fee award for those costs Mr. Allphin incurred in the trial court relating to these six e-mails. In addition to an award of costs and attorney fees, RCW 42.56.550(4) gives a court discretion to award Mr. Allphin a per diem penalty for each day the County withheld these records. We defer this discretionary award to the trial court. If the trial court exercises its discretion to award a penalty, it also has discretion to treat the six e-mails as one group for purposes of calculating the daily penalty. *See Double H, LP v. Dep't of Ecology, 166 Wn. App. 707, 714, 271 P.3d 322 (2012).*

¶80 Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

KORSMO and PENNELL, JJ., concur.

Review granted at *187 Wn.2d 1001 (2017).*

References

Washington Administrative Law Practice Manual

Washington Rules of Court Annotated (LexisNexis ed.)

Annotated Revised Code of Washington by LexisNexis

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[13] This author notes that while an award of *attorney fees* should be apportioned between successful and unsuccessful PRA claims, an award of other types of costs arguably should not be apportioned. This is because RCW 42.56.550(4) directs that "*all* costs" must be awarded to a person who prevails against an agency on a PRA claim. (Emphasis added.) "All costs" strongly suggests that the legislature intended for courts to award a successful PRA claimant "all costs" incurred. The legislature qualified its directive by using the term "reasonable" not before costs, but before "attorney fees."

Nevertheless, Mr. Allphin has not raised nor briefed this issue, and we do not find any clear authority. We therefore will not resolve the statutory ambiguity here. *See Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc., 119 Wn.2d 334, 352, 831 P.2d 724 (1992)* (stating [***42] that when the law is unsettled, an appellate court should not attempt to resolve an issue unless it is briefed by the parties).

FREIMUND JACKSON & TARDIF P.L.L.C

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