

FILED
Court of Appeals
Division II
State of Washington
6/29/2018 3:18 PM
No. 51987-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

BRIAN CORTLAND,

Appellant/Cross-Respondent

v.

LEWIS COUNTY,

Respondent/Cross-Appellant.

OPENING BRIEF OF APPELLANT/CROSS-RESPONDENT

Joseph Thomas, #49532
Law Office of Joseph Thomas
14625 SE 176th St., Apt. N101
Renton, WA
(206) 390-8848
Joe@JoeThomas.org

TABLE OF CONTENTS

I. INTRODCUTION	1
II. ASSIGNMENT OF ERROR	1
III. STATEMENT OF THE ISSUE.....	2
IV. STATEMENT OF THE CASE	3
A. Lewis County previously had a county law library board pursuant to RCW 27.24.010, <i>et. seq.</i> , but for some unknown reason it stopped functioning in the year 2010.....	3
B. Mr. Cortland made sixteen separate Public Records Act requests directed at the Lewis County Law Library Board	4
C. Lewis County Superior Court responded under court rule GR 31.1 to Mr. Cortland’s Public Records Act requests.....	4
V. ARGUMENT.....	5
A. The superior court erred when it decided which aggravating and mitigating factors would apply to this case.....	6
1. The superior court erred when it decided which aggravating and mitigating factors would apply to this case.....	7
2. The superior court erred when it ruled a delayed response is not an aggravating factor in this case.....	11
3. The superior court erred when it ruled a lack of strict compliance by the agency with all the PRA procedural requirements and exceptions is not applicable to this case.	14
4. The superior court erred when it ruled the aggravating factor of lack of proper training and supervision of agency personnel is not applicable to this case.	18

5.	The superior court erred when it ruled the unreasonableness of any explanation of noncompliance by the agency is not applicable to this case.	21
6.	The superior court erred when it ruled the aggravating factor of agency dishonesty is not applicable to this case. .	25
7.	The superior court erred when it ruled the aggravating factor of public importance is not applicable to this case. .	27
8.	The superior court erred when it ruled the aggravating factor of a penalty amount necessary to deter future misconduct is not applicable to this case.	31
9.	The superior court erred when it ruled the aggravating factor of Lewis County’s ultra vires actions – circumventing the Public Records Act through court rule GR 31.1 -- is not applicable to this case.	34
B.	The superior court erred as a matter of law in determining how many records were improperly withheld without examining the records either by affidavit or by in camera review.	38
C.	The superior court erred as a matter of law in allowing and considering Lewis County’s Response Penalty Brief when it did not comply with the mandatory legal requirements for service of legal documents mandated by state statute and court rule.	43
D.	The superior court abused its discretion when ruling in favor of Lewis County by disallowing or reducing five hundred and twenty-one hours (521) of uncontested reasonable attorney’s fees owed to Mr. Cortland and his attorney	45
E.	Mr. Cortland is entitled to an award of fees and costs under the Public Records Act as a prevailing party in this appeal.	49
VI.	REQUEST FOR RELIEF	50

TABLE OF AUTHORITIES

CASES

<i>American Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503</i> , 95 Wn. App. 106 (1999).	49
<i>Amren v. City of Kalama</i> , 929 P.2d 389 (1997).....	49
<i>Belenski v. Jefferson County</i> , 378 P. 3d 176 (Wash. 2016).	12-13, 23
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wash.2d 581 (1983).....	45
<i>Burt v. Washington State Dep’t of Corrections</i> , 361 P. 3d 283 (Wash. Ct. App. 2015).	6
<i>City of Federal Way v. Koenig</i> , 217 P. 3d 1172 (Wash. 2009).....	7-8, 9
<i>Costanich v. Washington State DSHS</i> , 194 P. 3d 988 (Wash. 2008).....	
.....	7-8, 10, 11, 14, 18, 21, 25, 27, 31, 34, 38
<i>Fiore v. PPG Industries, Inc.</i> , 279 P. 3d 972 (Wash. Ct. App. 2012). 46-47	
<i>Fritz v. Gorton</i> , 83 Wn.2d 275 (1974).	37
<i>Haslund v. Seattle</i> , 86 Wn.2d 607 (1976).	36
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123 (1978).....	15
<i>Hill v. Garda CL Northwest, Inc.</i> , 394 P. 3d 390 (Wash. Ct. App. 2017). 45	
<i>King v. Snohomish County</i> , 47 P. 3d 563 (Wash. 2002).	7, 8
<i>Limstrom v. Ladenburg</i> , 136 Wn. 2d. 595 (1998).	49-50
<i>Lybbert v. Grant County, State of Wash.</i> , 1 P. 3d 1124 (Wash. 2000). ...	7, 8
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wash.2d 677 2006).	39, 48

<i>Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane</i> , 261 P. 3d 119 (Wash. 2011).....	12
<i>Nissen v. Pierce County</i> , 357 P. 3d 45 (Wash. 2015).	42-43
<i>Progressive Animal Welfare Society v. University of Washington</i> (“Paws I”), 114 Wn. 2d 677 (1990).....	49
<i>Putman v. Wenatchee Valley Medical Center</i> , 216 P. 3d 374 (Wash. 2009).	37
 <i>Rental Housing Ass'n v. City of Des Moines</i> , 199 P. 3d 393 (Wash. 2009)...	
.....	23
<i>Rufin v. City of Seattle</i> , 398 P. 3d 1237 (Wash. Ct. App. 2017).....	6
<i>Spokane Research Fund v. City of Spokane</i> , 117 P. 3d 1117, (Wash. 2005).	15, 49
<i>State v. Momah</i> , 217 P. 3d 321 (Wash. 2009).....	
.....	11, 14, 18, 21, 25, 27, 31, 34, 38
<i>Waples v. Yi</i> , 234 P. 3d 187 (Wash. 2010).....	37
<i>West v. Thurston County</i> , 275 P. 3d 1200 (Wash. Ct. App. 2012)	13
<i>Woodward v. Seattle</i> , 140 Wash. 83 (1926).....	36
<i>Yousoufian v. Office of Ron Sims</i> , 229 P. 3d 735 (Wash. 2010).....	
.....	6-7, 8, 28, 30, 35, 39, 48
<i>Zink v. City of Mesa</i> , 166 P. 3d 738 (Wash. Ct. App. 2007).....	15

STATUTES

RCW 18.180.01044

RCW 27.24.0103, 29

RCW 27.24.0201, 3, 4, 29

RCW 27.24.04029

RCW 27.24.07029

RCW 27.24.90029

RCW 42.56.01037

RCW 42.56.03036

RCW 42.56.04016

RCW 42.56.08017

RCW 42.56.100 16-17, 24

RCW 42.56.15219, 24

RCW 42.56.52012, 15, 16, 22, 36

RCW 42.56.550 6, 10, 11, 14, 18, 21, 25, 27, 31, 34, 38, 42-43, 49

RCW 42.56.5804, 16, 19-20, 23, 32-34

WASHINGTON STATE COURT RULES

CR 18

CR 544

GR 31.11, 4, 5, 9, 11, 15-17, 19, 22-27, 30, 33, 35-37

RAP 18.149

THURSTON COUNTY LOCAL COURT RULES

LCR 16.....41

OTHER AUTHORITIES

Dishonesty, *Merriam-Webster Dictionary*.....26

Nature, *Merriam-Webster Dictionary*.....40

Unreasonable, *Dictionary.com*.....22

I. INTRODUCTION

This is a case of first impression where the Public Records Act requests at issue investigate the closure unlawful closure of an agency that is mandated by law to exist, pursuant to RCW 27.24.020(2). Instead of responding to Mr. Cortland's requests pursuant to the Public Records Act, the former Lewis County Chief Civil Deputy Prosecuting Attorney Glenn Carter created a roadblock of the records to be produced under the Public Records Act. Mr. Carter instructed Mr. Cortland to wait a few weeks, and then when the new GR 31.1 became effective, to request the records again not under the Public Records Act, but the new court rule GR 31.1 that pertains to judicial administrative records.

II. ASSIGNMENT OF ERRORS

1. The superior court erred as a matter of law in determining which aggravating and mitigating factors applied to this case.
2. The superior court erred as a matter of law in determining how many records were improperly withheld when the superior court expressly refused to examine the records.
3. The superior court erred as a matter of law in allowing and considering Lewis County's Response Penalty Brief when it did not comply with the mandatory legal requirements for the service of legal documents.

4. The superior court abused its discretion in determining attorney's fees.

III. STATEMENT OF THE ISSUE

1. Did the superior court err when ruling favorably for Lewis County on aggravating and mitigating factors that Lewis County did not brief? Did the superior court err when it ruled as a matter of law that the aggravating factor of a delayed response does not apply to this case? Did the superior court err when it ruled the aggravating factor lack of strict compliance by the agency with all the PRA procedural requirements and exceptions is not applicable to this case? Did the superior court err when it ruled the aggravating factor of lack of proper training and supervision of agency personnel is not applicable to this case? Did the superior court err when it ruled the aggravating factor of unreasonableness of any explanation of noncompliance by the agency is not applicable to this case? Did the superior court err when it ruled the aggravating factor of agency dishonesty is not applicable to this case? Did the superior court err when it ruled the aggravating factor of public importance is not applicable to this case? Did the superior court err when it ruled the aggravating factor of a penalty amount necessary to deter future misconduct is not applicable to this case? Did the superior court err when it ruled the aggravating factor

of a penalty amount necessary to deter future misconduct is not applicable to this case?

2. Did the superior court err when determining how many records were wrongfully withheld without inspecting the responsive records either by affidavit or in camera review?

3. Did the superior court err when ruling the Defendant's Response Penalty Brief was properly served when the brief did not comply with the mandatory legal requirements for the service of legal documents?

4. Mr. Cortland is entitled to an award of fees costs under the Public Records Act and as a prevailing party in this appeal.

IV. STATEMENT OF THE CASE

A. Lewis County Law Library Board

The Lewis County Law Library Board functioned for at least eighteen (18) years pursuant to RCW 27.24.020(2). Until 2010, Lewis County administered the Law Library Board pursuant to state statute RCW 27.24.020(2). *See* CP 380, ¶ 1; CP 9-10, ¶ 1(a) (stating "Lewis County used to have a Law Library Board" and the Board quit functioning in 2010). Sometime in 2010, the Lewis County Superior Court "terminated" the Lewis County Law Library Board in contravention to RCW 27.24.010, et. seq. CP 500-01.

At all times relevant to this lawsuit, RCW 27.24.020(2) mandated that Lewis County have a Law Library Board (through the use of the word “must”) by operation of Lewis County’s population. CP 383-84, ¶¶ 1-2. Lewis County permitted the Lewis County Superior Court to assume the administration of the Law Library in contravention to the law. *Id.*; CP 10, at ¶ 1(a) (stating “[O]ut of courtesy” Mr. Carter responded for an on behalf of the Lewis County Superior Court “in accordance with GR 31.1”).

B. Mr. Cortland’s Public Records Act Requests

Mr. Cortland made sixteen separate (16) public records requests on December 09, 2015 because he was concerned, if the Lewis County Law Library Board, a statutorily mandated agency, was functioning as prescribed by law. CP 380-82, at ¶¶ 4-5; CP 3-5, at ¶¶ 16-22.

Each of Mr. Cortland’s sixteen separate (16) public records requests were addressed to the Lewis County Law Library Board. CP 380, at ¶ 1. Because the Lewis County Law Library Board was not functioning at the time of Mr. Cortland’s Public Records Act requests, the Lewis County Law Library Board could not respond. CP 382-83, ¶ 5.

C. Lewis County Superior Court responded under court rule GR 31.1 to Mr. Cortland’s Public Records Act requests

Instead of forwarding Mr. Cortland’s requests to a Public Records Officer within the meaning of RCW 42.56.580, the requests were sent to former Lewis County Chief Civil Deputy Prosecuting Attorney Glenn

Carter. CP 383, at ¶ 7. Mr. Carter responded to the public records requests stating records of the Law Library Board are considered judicial records because since the Superior Court is now administering the Law Library its records are transformed into judicial records. *Id.* The response by Mr. Carter also stated the Lewis County Law Library is a judicial agency, no response would be required under the Public Records Act, and Mr. Cortland could re-file his requests under GR 31.1, as a request for judicial records when GR 31.1 became effective a few weeks later. *Id.*; CP 178 (stating “Unfortunately, GR 31.1 is not effective at this time. GR 31.1(o). The new rule will become effective **January 1, 2016**. You may wish to renew your requests under GR 31.1 at that time.”) (emphasis in original).

V. ARGUMENT

This appeal presents five issues: (1) whether the aggravating and mitigating factors were wrongfully applied or omitted as a matter of law; (2) whether the superior court can determine how many records were wrongfully withheld without inspecting the responsive records either by affidavit or in camera review; (3) whether Lewis County’s Response Penalty Brief should be considered by this Court or the superior court because it violated the court rules and state statutes governing legal service apply to Response Penalty Briefs; and (4) whether Mr. Cortland is

entitled to an award of fees costs under the Public Records Act and as a prevailing party in this appeal.

This Court's review on issues one (1) through three (3) are reviewed de novo. RCW 42.56.550(3); *Rufin v. City of Seattle*, 398 P. 3d 1237, 1245 (Wash. Ct. App. 2017) (stating "A trial court's interpretation of a statute is a question of law that we review de novo"). The fourth issue of attorney's fees is reviewed for abuse of discretion. *Burt v. Wash. State Dep't of Corrections*, 361 P. 3d 283, 291 (Wash.Ct. App. 2015).

A. The superior court erred when it decided which aggravating and mitigating factors would apply to this case

Lewis County cobbled together an argument for the aggravating factors. The separate factors in the multi-factor analysis are neither separated out, nor are they enumerated to differentiate them. Because of this unorganized, mishmashed approach the trial court and the opposing party was left to guess at which aggravating factors Lewis County was fairly arguing.

The Washington State Supreme Court adopted the multifactor framework, consisting of aggravating and mitigating factors, for the penalty determination in Public Records Act cases "to provide guidance to trial courts exercising their discretion so as to render those decisions consistent and susceptible to meaningful appellate review." *Yousoufian v.*

Office of Ron Sims, 229 P. 3d 735, 746 (Wash. 2010); *Id.* at 748. The multifactor framework was devised to effectuate the purpose of the Public Records Act to “identify factors that trial courts may appropriately consider in determining PRA penalties.” *Id.* at 747.

Lewis County made strategic decision not to brief seven (7) out of the nine (9) aggravating factors, in the multifactor analysis that Mr. Cortland briefed in his Opening Penalty Brief. Because Lewis County did not brief seven (7) out of the (9) aggravating factors in this case, there is no opposition, and Mr. Cortland’s Opening Penalty Brief is the facts for those issues (the uncontested aggravating factors).

1. The superior court erred by ruling that no aggravating factors apply to this case when Lewis County failed to argue seven (7) out of the (9) aggravating factors Mr. Cortland argued

As a matter of law, when a party does not argue an issue, it is waived under well-established Washington State case law. A court then does not have any discretion to rule in favor of parties who have intentionally waived arguments.

A party waives a defense where the party's actions indicate that it has abandoned the issue. *King v. Snohomish County*, 47 P. 3d 563, 565 (Wash. 2002) (citing *Lybbert v. Grant County, State of Wash.*, 1 P. 3d 1124, 1129 (Wash. 2000)); *Costanich v. Washington State DSHS*, 194 P.

3d 988, 995 (Wash. 2008) (Sanders, J., concurring) (stating “[f]ailure to argue an issue constitutes waiver of that issue”). The Washington State Supreme Court has repeatedly stated the doctrine of waiver is supported by the procedural foundation of “the just, speedy, and inexpensive determination of every action.” *King*, 47 P. 3d at 565 (quoting *Lybbert*, 1 P. 3d at 1129 (quoting CR 1))).

Here, the superior court found that no aggravating factors apply to this lawsuit. CP 825. However, Lewis County did not challenge seven (7) out of the nine (9) argued aggravators by Mr. Cortland. *Cf.* CP 397-411 (stating Mr. Cortland’s arguments regarding the aggravating factors); CP 498-501 (stating Lewis County’s arguments regarding the aggravating factors).

Mr. Cortland argued the following aggravating factors in his Opening Penalty Brief: 1. Extreme delayed response by agency; 2. No Strict Compliance; 3. Lack of proper training and no supervision of agency personnel; 4. Unreasonableness of any explanation of noncompliance by agency; 5. Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency unreasonableness of any explanation of noncompliance by agency; 6. Agency dishonesty; 7. Public Importance of the Issue; 8. Penalty amount necessary to deter future misconduct; 9. Lewis County performed Ultra Vires Act when it

attempted to impermissibly circumvent the Public Records Act through GR 31.1.¹ CP 397-411. When making these arguments Mr. Cortland

Lewis County challenged the following aggravating factors that Mr. Cortland are considerations in this lawsuit: 1. Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency unreasonableness of any explanation of noncompliance by agency; and 2. Penalty amount necessary to deter future misconduct.² CP 498-501. Lewis County chose not to enumerate or list which aggravating factors it argued. Combining the aggravating factors into one argument, without differentiating the separate aggravating factors, undermines the purpose of the multifactor framework which is to “to provide guidance to trial courts exercising their discretion so as to render those decisions consistent and susceptible to meaningful appellate review.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 746 (Wash. 2010); *Id.* at 748. The trial court cannot

¹ The aggravating factor of “Lewis County performed Ultra Vires Act when it attempted to impermissibly circumvent the Public Records Act through GR 31.1” is not directly listed as an aggravating factor in *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 748 (Wash. 2010). The *Yousoufian* court recognized that the list of aggravating factors is “not an exclusive list of appropriate considerations” and that other aggravating factors could be appropriate. Here Mr. Cortland argued the aggravating factor of ultra vires is an appropriate aggravating factor and deserved consideration by the trial court when determining the statutory penalty.

² Lewis County argued in in the mitigating factors that “[n]o amount of training or supervision would have informed the LC Superior Court that the Board is a non-judicial agency.” CP 499. This is not an argument to be considered either for an aggravator or a mitigator because only Lewis County was a named defendant in the action and only its actions are considered under the Public Records Act. Furthermore, the Lewis County Superior Court is part of the judiciary, and the judiciary cannot be an agency subject to the Public Records Act. *City of Federal Way v. Koenig*, 217 P. 3d 1172, 1175 (Wash. 2009) (concluding “the PRA does not apply to the judiciary”).

make informed decisions if a party does not enumerate or list which factors it is arguing.

By Lewis County making the strategic choice not to argue seven (7) out of the nine (9) aggravating factors, it acquiesced to Mr. Cortland's arguments regarding the aggravators not challenged. "Failure to argue an issue constitutes waiver of that issue." *Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Lewis County was given actual notice in Mr. Cortland's Opening Penalty Brief of which aggravating factors it is arguing. CP 397-411. For some unknown reason Lewis County was silent and did not brief or challenge seven (7) out of the nine (9) aggravating factors Mr. Cortland argued.

Waiver makes sense here because the Washington State Court of Appeals puts its feet in the trial court's shoes and reviews Public Records Act cases de novo. RCW 42.56.550(3). Seven (7) out of the nine (9) aggravating factors Mr. Cortland argued in the trial court was not briefed in the trial court. For this court, or any appellate court, to review the record, the argument must have been made in the first place. Therefore, Lewis County has waived its argument concerning the following aggravating factors for to brief and argue it in the trial court: 1. Extreme delayed response by agency; 2. No Strict Compliance; 3. Lack of proper training and no supervision of agency personnel; 4. Unreasonableness of

any explanation of noncompliance by agency; 5. Agency dishonesty; 6. Public Importance of the Issue; 7. Lewis County performed Ultra Vires Act when it attempted to impermissibly circumvent the Public Records Act through GR 31.1.

The superior court did not have any discretion in ruling on issues in favor of Lewis County when Lewis County made the strategic decision not to brief those issues. The superior court did not have any discretion to rule in favor of Lewis County on seven (7) out of the (9) aggravating factors because the only evidence and argument before the court was Mr. Cortland's argument that those aggravating factors should apply and increase the penalty amount. *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); *accord Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it Lewis County would be impermissibly making this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

2. The superior court erred when it ruled a delayed response is not an aggravating factor in this case

The Court of Appeals should find the aggravator of a delayed response is an aggravator that applies to this case and should be remanded back to the superior court for consideration.

The issue of the aggravating factor of a delayed response by the agency was unopposed in this lawsuit. Mr. Cortland argued in the Opening Penalty Brief that he received a delayed response by the agency of five hundred and eighty-six (586) days. CP 397-98. Lewis County failed to brief the issue of a delayed response by the agency. CP 498-501.

An agency's response spans from the agency's initial communication through the final production of records – a response under the Public Records Act is on-going and not a static idea. An “agency may respond in one of three ways: produce the records, ask for more time or clarification, or deny the request along with a proper claim of exemption.” *Belenski v. Jefferson County*, 378 P. 3d 176, 179 (Wash. 2016). A response to a Public Records Act request starts at the five-day letter. RCW 42.56.520(1). But a response continues to a request for extensions of the reasonable time estimate. RCW 42.56.520(2). Even an adequate search by an agency for responsive records is part of a response. *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011) (stating “[t]he failure to perform an adequate search

precludes an adequate response and production”). The production of documents is also included in the response. *Belenski*, 378 P. 3d at 179.

This Court re-affirmed a superior court ruling that a “534-day delay between the time [Requestor] made his PRA request and the time when the County properly disclosed” the records was an aggravating factor. *West v. Thurston County*, 275 P. 3d 1200, 1216 (Wash. Ct. App. 2012).

Here the facts are that Mr. Cortland made his Public Records Act requests on December 09, 2015. CP 380. Mr. Cortland’s Public Records Act requests were denied on December 11, 2015. CP 383. The superior court ruled the documents were produced to Mr. Cortland on June 09, 2017. CP 827.

When the superior court ruled that there was no delayed response it reasoned “Mr. Cortland received a prompt response indicating the position that the requested records were not subject to the Public Records Act.” CP 825. The superior court did not include any other analysis or address Mr. Cortland’s arguments.

As matter of law, the superior court erred by only considering the denial letter as a response, and not the production of documents. The well-established case law above clearly states that response does not stop at the initial letter but continues on to the search and the production of

documents. The superior court erred when it did not consider the production of documents in whether there was a delayed response.

Because Lewis County did not brief this issue at the trial court, Lewis County waived its opportunity to address it here. Lewis County would be inviting error by the Court of Appeals, if it tried to argue it for the first time on appeal. *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); *accord Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it Lewis County would be impermissibly making this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

3. The superior court erred when it ruled the aggravating factor of lack of strict compliance by the agency with all the PRA procedural requirements and exceptions is not applicable to this case

The Court of Appeals should find the aggravator of strict compliance by the agency is an aggravator that applies to this case and should be remanded back to the superior court for consideration.

The issue of the aggravating factor of a delayed response by the agency was unopposed in this lawsuit. Mr. Cortland argued in the Opening Penalty Brief that he received a delayed response by the agency

of five hundred and eighty-six (586) days. CP 398-400. Lewis County failed to brief the issue of a delayed response by the agency. CP 498-501.

“Strict enforcement of this provision discourages improper denial of access to public records.” *Spokane Research Fund v. City of Spokane*, 117 P. 3d 1117, 1123 (Wash. 2005); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140 (1978); *Zink v. City of Mesa*, 166 P. 3d 738, 743 (Wash. Ct. App. 2007).

Here in the Superior Court’s Order on Penalty, Attorney Fees, and Costs it conclusorily found “[t]here is no evidence in the record in this case that the Defendants failed to comply with the PRA procedural requirements.” CP 825.

The record is littered with evidence and examples that the agency had no compliance, let alone did not strictly comply with the Public Records Act – including the superior court’s Order on the Merits. CP 380-87. Because the agency, Lewis County, took no action on this request prior to the lawsuit being filed and served, there was absolutely no compliance by the agency.

First, Lewis County violated RCW 42.56.520 by not providing a five-day letter. Mr. Cortland has not received a response, to this day, pursuant to this day, pursuant to the Public Records Act. Lewis County only responded to Mr. Cortland pursuant to GR 31.1. CP 10,

at ¶ 1(a) (stating “[O]ut of courtesy” Mr. Carter responded for an on behalf of the Lewis County Superior Court “in accordance with GR 31.1”). The record is absent of Lewis County ever giving Mr. Cortland’ a five-day letter pursuant to RCW 42.56.520.

Second, Lewis County violated RCW 42.56.040 by not prominently displaying their policies and procedures concerning the Public Records Act. It is uncontested that neither that the Lewis County Law Library Board nor Lewis County in general “displayed, let alone prominently displayed their policies and procedures in accordance with the statutory requirements of the Public Records Act.” CP 161-62; *c.f. generally* CP 208-223.

Third, Lewis County violated RCW 42.56.580 in two ways. The first way RCW 42.56.580 is violated because Lewis County did not have a Public Records Officer “serve as a point of contact” for: 1. The public requesting public records; and 2. Overseeing agency compliance with the Public Records Act. RCW 42.56.580(1). CP 382-83. The second way RCW 42.56.580 is violated by Lewis County because it did not prominently display the name and contact information of the Public Records Officer. RCW 42.56.580(1); CP 382-83.

Fourth, Lewis County violated RCW 42.56.100 by not giving Mr. Cortland the fullest assistance as a requestor. In fact, Lewis County did not

give Mr. Cortland any assistance as a requestor. One, Lewis County unlawfully converted Mr. Cortland's Public Records Act requests at issue in this lawsuit. CP 10, at ¶ 1(a) (stating "[O]ut of courtesy" Mr. Carter responded for an on behalf of the Lewis County Superior Court "in accordance with GR 31.1"). Two, the request was never forwarded to be evaluated by a Public Records Officer. *Id.*; CP 382-83 at ¶ 5-7. Three, when Mr. Cortland's Public Records Act requests were presented to former Lewis County Chief Civil Deputy Prosecuting Attorney Glenn Carter to respond to and Mr. Carter told Mr. Cortland to re-submit his requests under a more stringent court rule in three weeks when it would become effective. CP 178.

Fifth, Lewis County violated RCW 42.56.080 by distinguishing Mr. Cortland amongst requestors. Every other requestor has his or her Public Records Act requests evaluated under the Public Records Act – except for Mr. Cortland.

Thus, there was no enforcement or compliance with the Public Records Act at all. Lewis County flagrantly ignored requests expressly made under the Public Records Act and only responded pursuant to GR 31.1 in order to conceal records from the public.

As matter of law, the superior court erred by not considering Mr. Cortland's extensive arguments about why Lewis County did not strictly comply with the Public Records Act.

Because Lewis County did not brief this issue at the trial court, Lewis County waived its opportunity to address it here. Lewis County would be inviting error by the Court of Appeals, if it tried to argue it for the first time on appeal. *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); accord *Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it Lewis County would be impermissibly making this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

4. The superior court erred when it ruled the aggravating factor of lack of proper training and supervision of agency personnel is not applicable to this case

The issue of the aggravating factor lack of proper training and supervision of agency personnel was unopposed in this lawsuit. Mr. Cortland argued in the Opening Penalty Brief there indeed was a lack of proper training and supervision of agency personnel. CP 400-02. Lewis County failed to brief the aggravating factor of lack of lack of proper training and supervision of agency personnel. CP 498-501.

Here in the Superior Court’s Order on Penalty, Attorney Fees, and Costs it conclusorily found “[t]here is no evidence of lack of training and supervision.” CP 825.

Public Records Officers play an integral role in responding to public records requests made under the Public Records Act. The importance of public records officers in fulfilling public records requests cannot be understated. First, Public Records Officers “serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency’s compliance with the public records disclosure.” RCW 42.56.580(1). Second, Public Records Officers must be publicly appointed, so that the public knows with whom to contact concerning his public records requests. RCW 42.56.580(3). Third, Public Records Officers undergo statutorily mandated training, so that they know how best to comply with the statute. RCW 42.56.152.

The record is absent of any person who participated in responding to Mr. Cortland’s public record requests is an appointed Public Records Officer pursuant to RCW 42.56.580(1) and RCW 42.56.580(3). CP 10, at ¶ 1(a) (stating “[O]ut of courtesy” Mr. Carter responded for an on behalf of the Lewis County Superior Court “in accordance with GR 31.1”); *accord* CP 382-83. The record is absent of identifying Ms. Lisa Conzatti (the employee who received Mr. Cortland’s Public Records Act requests)

as a Public Records Officer pursuant to RCW 42.56.580. *See e.g.* CP 382-83. The record is also absent that former Lewis County Chief Civil Deputy Prosecuting Attorney Glenn Carter is a Public Records Officer pursuant to RCW 42.56.580. CP 382-83 (identifying that Mr. Carter responded to Mr. Cortland's Public Records Act requests).

Moreover, at no time did any of the people who participated in responding to Mr. Cortland's requests made under the Public Records Act take the requests to a Public Records Officer with the meaning of RCW 42.56.580, for Mr. Cortland's requests to be reviewed and analyzed pursuant to the Public Records Act.

There is at least one Public Records Officer in the Lewis County Prosecuting Attorney's Office. Casey Mauermann works as a Public Records Officer for Lewis County.

There is no excuse that a Public Records Officer should not have even looked at this. Mr. Cortland's request was clearly labeled as made under the Public Records Act. Mr. Cortland's request was not treated as a request made under the Public Records Act because of poor training and supervision of how Public Records Act requests are treated.

As matter of law, the superior court erred by not considering Mr. Cortland's extensive arguments about why Lewis County did not strictly comply with the Public Records Act.

As matter of law, the superior court erred by not considering Mr. Cortland's extensive arguments about the lack of training and supervision of agency personnel.

Because Lewis County did not brief this issue at the trial court, Lewis County waived its opportunity to address it here. Lewis County would be inviting error by the Court of Appeals, if it tried to argue it for the first time on appeal. *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); accord *Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it Lewis County would be impermissibly making this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

5. The superior court erred when it ruled the aggravating factor of unreasonableness of any explanation of noncompliance by the agency is not applicable to this case

The issue of the aggravating factor of unreasonableness of any explanation of noncompliance by the agency was unopposed in this lawsuit. Mr. Cortland argued in the Opening Penalty Brief the unreasonableness of any noncompliance by the agency is an aggravating factor applicable to this lawsuit. CP 402-04. Lewis County failed to brief

the aggravating factor of lack of lack of proper training and supervision of agency personnel. CP 498-501.

The superior court never ruled on this enumerated *Yousoufian* aggravating factor. CP 825. The record is absent in the Order on Penalty, Attorneys Fees, and Costs of the superior court ruling on this aggravating factor. *Id.*

A common definition of reasonable is “not reasonable or rational; acting at variance with or contrary to reason; not guided by reason or sound judgment; irrational.” Unreasonable, *Dictionary.com* (June 17, 2018, 11:45 AM) <http://www.dictionary.com/browse/unreasonable?s=t>.

Here in the Superior Court’s Order on Penalty, Attorney Fees, and Costs it conclusorily found “that no aggravating factors apply in this case.” CP 825. But the Court failed to analyze this aggravating factor either through Mr. Cortland’s arguments or the Court’s own arguments. CP 825-26. The superior court failed to state its conclusions of whether Lewis County’s actions were at variance or contrary to reason.

Lewis County acted unreasonably by denying Mr. Cortland a response pursuant to the Public Records Act, as required by RCW 42.56.520. CP 10, at ¶ 1(a) (stating “[O]ut of courtesy” Mr. Carter responded for an on behalf of the Lewis County Superior Court “in accordance with GR 31.1”). RCW 42.56.520 explains the three options

have when responding to a Public Records Act request. *Belenski v. Jefferson County*, 378 P. 3d 176, 179 (Wash. 2016); *Rental Housing Ass'n v. City of Des Moines*, 199 P. 3d 393, 402 (Wash. 2009) (Fairhurst, J., concurring) (stating 1. Provide the record; 2. Ask for an extension; 3. Deny the record). Lewis County did not do any of these and former Lewis County Chief Civil Deputy Prosecuting Attorney Glenn Carter responded to Mr. Cortland's requests on behalf of the Lewis County Superior Court. CP 10, at ¶ 1(a) (stating "[O]ut of courtesy" Mr. Carter responded for an on behalf of the Lewis County Superior Court "in accordance with GR 31.1"). Lewis County never attempted to explain why it simply did not respond under the Public Records Act and instruct Mr. Cortland to re-submit his request under GR 31.1 in a few weeks when it would become effective. CP 178.

Lewis County acted unreasonably when it did not have a Public Records Officer oversee agency compliance with Mr. Cortland's December 09, 2015 requests, in violation of RCW 42.56.580. CP 382-83 (identifying that Mr. Carter responded to Mr. Cortland's Public Records Act requests). The law requires a Public Records Officer "to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance" with the Public Records Act. RCW 42.56.580(1). Lewis County never provided any

reasonable explanation why Lewis County Chief Civil Deputy Prosecuting Attorney Glenn Carter and not a Public Records Officer oversaw Mr. Cortland's requests that were clearly labeled as subject to the Public Records Act. It is unreasonable when Lewis County has a Public Records Officer for the Public Records Officer not to serve as the point of contact in accordance with the law. Additionally, it is even more unreasonable that the Public Records Officer did not oversee compliance and allowed an attorney working on behalf of the Lewis County Superior Court to make the decision.

Lewis County acted unreasonably by distinguishing Mr. Cortland amongst requestors, in violation of RCW 42.56.100. Lewis County unlawfully converted Mr. Cortland's Public Records Act requests at issue in this lawsuit. CP 10, at ¶ 1(a) (stating "[O]ut of courtesy" Mr. Carter responded for an on behalf of the Lewis County Superior Court "in accordance with GR 31.1"). Furthermore, when Mr. Cortland's Public Records Act requests were presented to former Lewis County Chief Civil Deputy Prosecuting Attorney Glenn Carter to respond to and Mr. Carter told Mr. Cortland to re-submit his requests under a more stringent court rule in three weeks when it would become effective. CP 178. It was unreasonable for anyone other than the Public Records Officer to oversee Public Records Act requests because they must have training. RCW

42.56.152. Moreover, it is even more unreasonable for Lewis County not to grant or deny Mr. Cortland's request, to but tell him to make the request under GR 31.1 when it became effective. CP 178.

Because the superior court failed to rule on this aggravating factor, it is in appropriate for the Court of Appeals to rule on this issue, and it must be remanded back down to the superior for a judicial determination. *See* CP 825 (stating the court's reasons for denying other aggravating factors).

Because Lewis County did not brief this issue at the trial court, Lewis County waived its opportunity to address it here. Lewis County would be inviting error by the Court of Appeals, if it tried to argue it for the first time on appeal. *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); *accord Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it Lewis County would be impermissibly making this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

6. The superior court erred when it ruled the aggravating factor of agency dishonesty is not applicable to this case

The issue of the aggravating factor of unreasonableness of any explanation of noncompliance by the agency was unopposed in this lawsuit. Mr. Cortland argued in the Opening Penalty Brief there indeed was a lack of proper training and supervision of agency personnel. CP 405-07. Lewis County failed to brief the aggravating factor of lack of lack of proper training and supervision of agency personnel. CP 498-501.

Here in the Superior Court's Order on Penalty, Attorney Fees, and Costs it conclusorily found "[n]or is there evidence of agency dishonesty." CP 825.

A common definition of the word dishonesty is "lack of honesty or integrity : disposition to defraud or deceive." Dishonesty, *Merriam-Webster Dictionary* (June 17, 2017, 11:25 AM), <https://www.merriam-webster.com/dictionary/dishonesty>. To this day Lewis County is demonstrating on-going dishonesty with regards to Mr. Cortland's public records requests at issue in this lawsuit.

First, Lewis County was dishonest about the nature of the records requested. Lewis County claimed that the records were judicial administrative records subject to GR 31.1 and intentionally disregarded the Public Records Act. CP 10, at ¶ 1(a) (stating "[O]ut of courtesy" Mr. Carter responded for an on behalf of the Lewis County Superior Court "in accordance with GR 31.1"); CP 178. This is dishonest because Lewis

County did not even perform a search under the Public Records Act before making the perfunctory determination that all of the documents responsive to Mr. Cortland's requests were judicial records, subject to GR 31.1. This goes beyond a mere non-adherence to the statutory requirements of the Public Records Act to attempting to deceive Mr. Cortland that these records were not available via the Public Records Act.

As matter of law, the superior court erred by not considering Mr. Cortland's argument about the agency's dishonesty.

Because Lewis County did not brief this issue at the trial court, Lewis County waived its opportunity to address it here. Lewis County would be inviting error by the Court of Appeals, if it tried to argue it for the first time on appeal. *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); accord *Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it Lewis County would be impermissibly making this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

- 7. The superior court erred when it ruled the aggravating factor of public importance is not applicable to this case**

The issue of the aggravating factor of unreasonableness of any explanation of noncompliance by the agency was unopposed in this lawsuit. Mr. Cortland argued in the Opening Penalty Brief that his Public Records Act requests at issue in this lawsuit are of public importance. CP 407-08. Lewis County failed to brief the aggravating factor of public importance. CP 498-501.

Here in the Superior Court's Order on Penalty, Attorney Fees, and Costs it conclusorily found "[t]he records requested have public importance, as all public records do but there is no evidence that these records were any more important to the public than any other public record, and thus this is not an aggravating factor." CP 825. That is all the superior court mentioned of this aggravating factor in its Order on Penalty, Attorney Fees, and Costs.

In determining public importance of an issue there neither needs to be "actual public harm," nor does the Plaintiff have to "uncover[] the proverbial 'smoking gun.'" *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 745 (Wash. 2010). But "the significance of the issue to which the request is related was foreseeable to the agency." *Id.*

Mr. Cortland's requests sought information about the existence, functioning and administration of the Lewis County Law Library and Law Library Board that was being unlawfully administered. CP 380-83. The

Lewis County Law Library Board ceased functioning sometime in 2010 and at “that time, the Washington Superior Court in and for Lewis County assumed administration of the Law Library.” CP 9-10, ¶ 1(a).

County Law Libraries are required in counties “with a population of eight thousand or more” to be governed according to RCW 27.24.010, *et. seq.* The County Law Library Statute “is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions.” RCW 27.24.900. County Law Libraries are publicly funded through court filing fees. RCW 27.24.070. County law Library Boards are statutorily required to make an annual presentation “to the county legislative authority of their county” concerning “a full statement of all property received and how used” which includes a full financial report. RCW 27.24.040. The chair of the legislative authority of the county, is the *ex officio* of the County Law Library Board. RCW 27.24.020(2).

Upon receiving Mr. Cortland’s request, Lewis County knew of the significance to which the request was foreseeable to the agency. Lewis County knew that it was not administering a County Law Library Board pursuant to RCW 27.24.020(2) because it unlawfully acquiesced to the Lewis County Superior Court’s administration. CP 9-10, ¶ 1(a). It is self-evident that Lewis County knew it’s conduct was unlawful because it

failed to even perform a search for records under the Public Records Act for Mr. Cortland's Public Records Act requests. Instead, Lewis County attempted to force Mr. Cortland to make his request through GR 31.1 and the judiciary. CP 178.

It is absolutely an issue of public importance when a person makes a Public Records Act request for documents that identify unlawful administration of a statutorily required agency, that is funded solely through public funds.

The superior court arbitrarily and capriciously decided this aggravating factor. Thurston County Superior Court Judge, Honorable Christopher Lanese, did not even bother to perform the analysis to determine if the legal standard was met for applying this aggravating factor according to the *Yousoufian* court. *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 745 (Wash. 2010).

The superior court should have expressly considered whether the "significance of the issue to which the request is related was foreseeable to the agency." *Id.*

Since the Superior Court erred by not addressing the legal standard to determine the application of this aggravating factor this case needs to be remanded so the superior court can address this aggravating factor.

Because Lewis County did not brief this issue at the trial court,

Lewis County waived its opportunity to address it here. Lewis County would be inviting error by the Court of Appeals, if it tried to argue it for the first time on appeal. *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); accord *Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it Lewis County would be impermissibly making this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

8. The superior court erred when it ruled the aggravating factor of a penalty amount necessary to deter future misconduct is not applicable to this case

The issue of the aggravating factor of a penalty amount necessary to deter future misconduct was unopposed in this lawsuit. Mr. Cortland argued in the Opening Penalty Brief that his Public Records Act requests at issue in this lawsuit are of public importance. CP 408-09. Lewis County failed to brief the aggravating factor of a penalty amount necessary to deter future misconduct. CP 498-501.

Here in the Superior Court's Order on Penalty, Attorney Fees, and Costs it found:

As to the need to deter future misconduct of the Defendants, counsel for the Defendants has represented to the Court at oral argument in this

case, that following the Court’s ruling on the merits, the Defendants would be complying with the Public Records Act in a manner consistent with this Court’s ruling on the merits in this case. The Court relies upon that representation in finding that aggravating factor to be not present in this case. This representation benefited the Defendants and was accepted by the Court. Thus, the Defendants are judicially estopped from taking any inconsistent positions in the future—there is no need to impose a larger penalty amount to deter future misconduct.

CP 825-26.

The superior court also relied upon impermissible testimony of Lewis County’s attorney of record in the lawsuit, former Lewis County Chief Civil Deputy Prosecuting Attorney Glenn Carter’s assertion that Lewis County “would be complying with the Public Records Act” in the future. CP 825-26. As a matter of law, Mr. Carter did not have any authority to make that statement. There is no evidence in the record that Mr. Carter had any control over how Lewis County responds to Public Records Act requests. Instead of Mr. Carter, only the Lewis County Public Records Officer could testify about Lewis County’s future compliance with the Public Records Act. *See* RCW 42.56.580 (stating the duty of the Public Records Officer is to “oversee the agency's compliance with the public records disclosure requirements”). Additionally, there is no evidence to substantiate Mr. Carter’s naked assertions to the superior court. There are no declarations, affidavits, or other evidence to

substantiate Mr. Carter's conclusory statement. As a matter of law, the superior court erred when considering Mr. Carter's testimony. When considering to apply this factor de novo on appeal, this court should not consider Mr. Carter's unauthorized, conclusory testimony.

This court should only consider the factual evidence in the record, as argued by Mr. Cortland. There is a pattern and practice of Lewis County giving requests directed to the Lewis County Law Library Board to the Lewis County Superior Court to respond to under GR 31.1 to circumvent the Public Records Act and conceal important documents from public scrutiny. CP 408-09. At the time of the penalty briefing there were two other concurrent lawsuits in the Thurston County Superior Court regarding requests directed to the Lewis County Law Library Board, which Lewis County gave to the Lewis County Superior Court to respond under GR 31.1. See *Hupy v. Lewis County*, 17-2-01027-34; *Cortland v. Lewis County*, 17-2-04278-34 ("Cortland II").³

Since the Superior Court erred as a matter of law by relying upon former Lewis County Chief Civil Deputy Prosecuting Attorney Glenn Carter's testimony about how the Lewis County Public Records Officer will comply with the Public Records Act in the future. Pursuant to RCW

³ Thurston County Superior Court Judge Honorable Christopher Lanese presided over the entire case in *Cortland v. Lewis County*, 17-2-04278-34 ("Cortland II"), and was aware that other requests directed to the Lewis County Law Library Board were given to the Lewis County Superior Court to fulfill.

42.56.580(1) only the Public Records Officer oversees the agency's compliance with the Public Records Act and there is no declaration, affidavit, or other evidence substantiating Mr. Carter's naked assertion. This should be remanded back down to the superior court, so this factor can be ruled upon in the context of RCW 42.56.580(1).

Because not addressing the legal standard to determine the application of this aggravating factor this case needs to be remanded so the superior court can address this aggravating factor. Because Lewis County did not brief this issue at the trial court, Lewis County waived its opportunity to address it here. *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); *accord Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it Lewis County would be impermissibly making this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

9. The superior court erred when it ruled the aggravating factor of Lewis County's ultra vires acts – circumventing the Public Records Act through court rule GR 31.1 – is not applicable is not applicable to this case

The issue of the aggravating factor of Lewis County's ultra vires acts of circumventing the Public Records Act through GR 31.1 was

unopposed in this lawsuit. Mr. Cortland argued in the Opening Penalty Brief that Lewis County's acts were ultra vires when it permitted the Lewis County Superior Court to respond to Mr. Cortland's Public Records Act requests under court rule GR 31.1. CP 409-11. Lewis County failed to brief the aggravating factor of lack of lack of proper training and supervision of agency personnel. CP 498-501.

The superior court never ruled on aggravating factor. CP 825.

This aggravating factor is not enumerated by the *Yousoufian* court. *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 748 (Wash. 2010). The *Yousoufian* court's enumerated aggravating factors "are not an exclusive list of appropriate considerations." *Id.* Thus, other factors must be considered by the superior court when presented and may be applied to cases when appropriate.

Lewis County acts were ultra vires, and in bad faith, contrary to existing law and statute by demanding that Mr. Cortland resubmit his requests under GR 31.1 that were originally made under the Public Records Act. This demand was made outside of existing law or statute because there no legal authority that allowed Lewis County to convert Mr. Cortland's Public Records Act requests to GR 31.1 requests, thus knowingly and intentionally depriving Cortland of his statutory rights.

See RCW 42.56.030 (stating the “people of this state do not yield their sovereignty to the agencies that serve them”). At least two legal doctrines prohibit this attempt to circumvent the Public Records Act. Lewis County performed an ultra vires act, by responding to Mr. Cortland’s request in violation of existing law or statute. *Haslund v. Seattle*, 86 Wn.2d 607, 622 (1976); *Woodward v. Seattle*, 140 Wash. 83, 87 (1926).

First, the plain language of the Public Records Act states that if the Public Records Act is in conflict with any other law, then the Public Records Act “shall govern.” RCW 42.56.030. Here, Lewis County made GR 31.1 in conflict with the Public Records Act by choosing to the procedures of GR 31.1 over mandates of the Public Records Act. *See e.g.* RCW 42.56.520 (requiring a five-day letter under the Public Records Act). This is an ultra vires act which Lewis County did not have the authority to make because the Public Records Act is a super-statute which governs over any other law.

Second, case law is very clear that the Public Records Act prevails when in conflict with GR 31.1 because under long-standing legal precedent: when legislative substantive law and court procedure conflict on a substantive issue, substantive law prevails.

“If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters.” *Putman v. Wenatchee Valley Medical Center*, 216 P. 3d 374, 377 (Wash. 2009). “Substantive law creates, defines, and regulates primary rights, while procedures involve the operations of the courts by which substantive law, rights, and remedies are effectuated.” *Waples v. Yi*, 234 P. 3d 187, 192 (Wash. 2010) (quoting *Putman*, 216 P.3d at 379) (internal quotation marks omitted).

The Public Records Act is a substantive law passed first by a citizen’s initiative 276 on Nov. 07, 1972, took effect on Jan. 01, 1973, and was later modified by the Washington State Legislature. *Fritz v. Gorton*, 83 Wn.2d 275, 284-85 (1974). The Public Records Act creates and defines the definition of what public records are and what governmental agencies are subject to the public records act making it substantive law. RCW 42.56.010. Washington State court rule GR 31.1 is a procedure inspecting or viewing records held by the court. What GR 31.1 does is create a uniform court procedure in order to access records held by the court. Lewis County performed an ultra vires act because it did not have the authority to make the determination to choose a procedural court rule over a substantive state law, in violation of well-established case law.

Because the superior court failed to rule on this aggravating factor of ultra vires acts, it must be remanded back down to the superior for a judicial determination. *See* CP 825 (stating the court's reasons for denying other aggravating factors).

Because Lewis County did not brief this issue at the trial court, Lewis County waived its opportunity to address it here. Lewis County would be inviting error by the Court of Appeals, if it tried to argue it for the first time on appeal. *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); *accord Costanich v. Washington State DSHS*, 194 P. 3d 988, 995 (Wash. 2008) (Sanders, J., concurring). Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it Lewis County would be impermissibly making this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

B. The superior court erred as a matter of law in determining how many records were improperly withheld without examining the records either by affidavit or by in camera review

The superior court erred when it made a judicial determination grouping the records that were improperly withheld without examining the records either by affidavit or by in camera review. The superior court arbitrarily and capriciously determined the number the number of records that were wrongfully withheld -- absent of any evidence that the records

are similar and could be grouped. The superior court did not have any discretion in this matter because it refused to examine the records at issue in this lawsuit.

This is an abuse of discretion where the superior court had no discretion to begin with because it did not view the records. “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 743 (Wash. 2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684 (2006)). “A trial court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.” *Yousoufian*, 229 P. 3d at 43 (internal quotation marks omitted) (quoting *Mayer*, 156 Wash.2d at 684).

Without viewing the records, the superior court made a finding that in its Order on the Penalty, Attorneys Fees, and Costs that it could group the three thousand six hundred and eighty-two (3,682) responsive records produced by Lewis County after the Merits Hearing, into just two categories of “expenditure reports and revenue reports.” CP 827. When making the finding that two records were wrongfully withheld the superior court reasoned “[b]ased on the nature of the requests, the nature of the records, and the purposes underlying the Public Records Act, the Court

finds that it is appropriate to group separate pages of documents into two subject matter-based records for purposes of determining the penalty in this case.” *Id.* The two categories of records functioned as two documents when the superior court determined the statutory penalty. *Id.*

A common definition of the word nature is “the inherent character or basic constitution [] of a person or thing.” Nature, *Merriam-Webster Dictionary* (June 17, 2017, 11:25 AM) (parenthetical reference omitted), <https://www.merriam-webster.com/dictionary/nature>.

To make a judicial determination regarding the nature of the documents, which is the inherent character of the documents, a judge would have to examine the documents. Here even Thurston County Superior Court Judge, Honorable Christopher Lanese, admitted that he did not view and did not want to view the three thousand six hundred and eight-two (3,682) documents that Lewis County produced after the Merits Hearing.

At the Penalty Hearing in this lawsuit, Honorable Judge Christopher Lanese of the Thurston County Superior Court used his discretion to narrow down the amount of records in dispute to categories without inspecting the records or hearing adversarial argument about it.

So I don't need the documents included. If you believe that there is something that there is dispute that requires my consideration of the four corners of

a document, that is your discretion and judgment to attach that. I don't want 3,600, or whatever it is, pages of documents in my chambers, and based on - - if it were necessary, I would welcome that. Based on my review of what I'm aware of so far, I don't think that that is necessary. I believe, based on what I've seen so far, that categories and descriptions of documents are not really in dispute, and that will be sufficient for the Court to determine whether or not a document was responsive.

VRP, vol. II, at 11.

Mr. Cortland even brought to the superior court's attention several times that it had not viewed the documents, but under the Local Court Rules the "only way this Court is able to conduct an in camera review of documents is through a Court order. See LCR 16(c)(2)." CP 650. The record is absent of the superior court ordering an in camera review of the documents. *See* CP 649 (stating "[t]he record is absent of Lewis County making any filings to dispute the amount of responsive records produced, such a... LCR 16(c)(2) Motion for an In Camera Review"⁴; VRP vol. II, at 11 (stating the court expressly refused to review the documents because the superior court did not "want 3,600, or whatever it is, pages of documents in my chambers").

The record is absent of any court order for an in camera review of the three thousand six hundred and eighty two (3,682) documents or order

⁴ Thurston County Superior Court Local Court Rule ("LCR") 16(c)(2) states the procedure for having in camera reviews of records in dispute in Public Records Act lawsuits.

admitting the three thousand six hundred and eighty two (3,682) documents into evidence.

No reasonable person would make a judicial determination about the nature of the documents at issue in this case without first reviewing the documents either by affidavit or by in camera review.

“The PRA allows a trial court to resolve disputes about the nature of a record based solely on affidavits, RCW 42.56.550(3), without an in camera review.” *Nissen v. Pierce County*, 357 P. 3d 45, 57 (Wash. 2015) (internal quotation marks omitted).

Thus, according to the *Nissen* court, a superior court can determine the nature of the record based either on affidavits or an in camera review. Here the superior court stated that it determined the nature of the documents but did not state how it made that determination. The record is absent of any affidavits identifying the nature of each of the documents. The record is further absent of any in camera review proceedings. A superior court may choose to make its judicial determination off of either the affidavits or the in camera review. It is impermissible for a superior court to make a judicial determination absent affidavits describing the nature of the documents or an in camera review. The superior court actions of making a judicial determination of the nature of the documents without either affidavits describing the nature of the documents or an in

camera review is manifestly unreasonable pursuant to *Nissen*, 357 P. 3d at 57 (construing RCW 42.56.550(3)).

The superior court acted arbitrarily and capriciously when it failed to adhere to the mandatory statutory requirements, as construed by well-established case law, of the procedure for making a judicial determination regarding the nature of the records for the statutory penalty.

This case needs to be remanded back down to the superior court for either: 1. Affidavits presented concerning the nature of the responsive documents; or 2. An in camera review of the responsive documents. When the case is remanded back down to the superior court, the superior court can make its ruling pursuant to RCW 42.56.550(3) as construed by *Nissen*, 357 P. 3d at 57.

C. The superior court erred as a matter of law in allowing and considering Lewis County's Response Penalty Brief when it did not comply with the mandatory legal requirements for the service of legal documents mandated by state statute and court rule

Lewis County sent its Response Brief via United Parcel Service ("UPS") next day air service. The certificate of service states that the Response Brief was given to UPS on October 18, 2017. CP 513. Mr. Cortland objected that the superior court should not have considered Lewis County's Response Penalty Brief because it was not served in accordance with state statute and court rules. CP 916; CP 842.

There is no statute, court rule, or legal authority which Lewis County can point to explain how it legally served Defendant's Response Penalty Brief upon Mr. Cortland's attorney of record on October 30, 2017. State statute governs process servers. *See* RCW 18.180.010. Process servers who are paid must be licensed by the County Auditor. *Id.* The record is absent of Lewis County ever producing documentation showing that the UPS employee who delivered Response Penalty Brief is registered as a process server in any county in Washington State.

The plain language of the statute states that anyone who is paid to serve legal documents must be registered with the Auditor of said County. In this instance, Mr. Cortland's attorney lives in the City of Renton located in King County. Lewis County paid a for-profit company, United Parcel Service to serve Mr. Cortland's attorney the Response Brief at his place of business located in King County. Lewis County provided no proof in the record of the United Parcel Service employee who served the documents to Mr. Cortland's attorney of being registered as a process server with the King County Auditor's Office.

This is not service at all under the Revised Code of Washington, RCW 18.180.010, or the Washington State Rules of Civil Procedure, CR 5(b).

Because Lewis County failed to serve Mr. Cortland's attorney with the Response Brief to the Penalty, and Mr. Cortland timely objected, this Court should reconsider the penalty, strike Lewis County's Brief from the record, disregard any arguments Lewis County made regarding the penalty and to increase the penalty accordingly.

D. The superior court abused its discretion when ruling in favor of Lewis County by disallowing or reducing five hundred and twenty-one hours (521) of uncontested reasonable attorney's fees owed to Mr. Cortland and his attorney

The superior court arbitrarily and capriciously disallowed or reduced five hundred and twenty-one (521) hours that were uncontested hours that should be payable as attorney's fees. Because Lewis County did brief or argue any of the issues that led to the reduction of the uncontested hours the court acted unreasonably and unfairly made arguments on behalf of Lewis County to Mr. Cortland's detriment. There is no evidence in the record to support the superior court's findings in regard to the uncontested attorneys fees, and the superior court abused its discretion.

"To determine the lodestar, the court multiplies the number of hours reasonably spent on the case by a reasonable hourly rate." *Hill v. Garda CL Northwest, Inc.*, 394 P. 3d 390, 411 (Wash. Ct. App. 2017); *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 593-94 (1983).

When determining an award of attorney's fees "the amount of time expended by [opposing] counsel in performing the same task may well be the best measure of what amount of time is reasonable for this task." *Fiore v. PPG Industries, Inc.*, 279 P. 3d 972, 988 (Wash. Ct. App. 2012) (internal quotation marks omitted).

Here the superior court established the reasonable hourly rate of two hundred (\$200) dollars an hour. CP 828. The superior court disallowed or reduced five hundred and twenty-one (521) hours claimed by Mr. Cortland's attorney as reasonable attorney's fees to be awarded as the prevailing party. CP 829-38. These hours were uncontested and the superior court did not have discretion to disallow or reduce hours that are uncontested.

Lewis County only challenged whether attorney's fees should be granted in this lawsuit for: 1. Four motions to compel production of discovery; 2. Four motions for CR 11 sanctions; 3. Two motions to strike; 4. Motion to waive transcript fees and for legal research of that issue; 5. Three miscellaneous motions on penalties; and 6. Time for commute (travel time). CP 1021-27.

The superior court sua sponte disallowed hours on the following issues that were not contested by Lewis County: 1. Client communications (62 hours disallowed); 2. Factual research (9.8 hours disallowed); 3.

Declarations (16.3 hours disallowed); 4. Researching CR 5 (3.5 hours disallowed); Objections (9.2 hours disallowed).

The superior court sua sponte reduced hours on the following issues that were not contested by Lewis County: 1. Drafting discovery requests (from 15.1 to 2 hours); 2. Legal research on defendant's discovery requests (12.1 to 2); 3. Emails with opposing counsel (25.8 to 3); 4. Draft discovery responses (28 to 5); 5. Review discovery responses (93 to 15); 6. Merits research (245 to 80); 7. Continuance (22.7 to 3); 8. Research regarding penalty (91.6 to 20); 9. Fee request (28.4 to 10).

Not only were these hours uncontested by Lewis County, Lewis County did not submit any evidence as to what reasonable hours should be. CP 1037; 1042. According to binding case law "a comparison of hours and rates charged by opposing counsel is probative of the reasonableness of a request for attorney fees by prevailing counsel." *Fiore v. PPG Industries, Inc.*, 279 P. 3d 972, 988 (Wash. Ct. App. 2012).

Because Lewis County did not contest these hours and did not submit any evidence of their own hours to challenge the reasonableness, the hours submitted by Mr. Cortland's attorney are presumptively reasonable.

This is an abuse of discretion where the superior court had no discretion to begin with because it did not view the records. "A trial court

abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 743 (Wash. 2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684 (2006)). “A trial court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.” *Yousoufian*, 229 P. 3d at 43 (internal quotation marks omitted) (quoting *Mayer*, 156 Wash.2d at 684).

No reasonable person would make these determinations without the issues being brief by Lewis County and without any evidence such as a log of the hours Lewis County worked on this case. The reason why is because it would lead to serious questions of the impartiality of the superior court by ruling on arguments not made and evidence not in the record.

This Court of Appeals must overturn the superior court’s ruling disallowing or reducing five hundred and twenty-one hours of reasonable attorney’s fees owed to Mr. Cortland and his attorney. Since the superior court already determined a reasonable hourly rate of two hundred dollars an hour, this court must award an additional one hundred and four thousand, two hundred (\$104,200.00) dollars in reasonable attorney’s fees from uncontested work at the superior court.

E. Mr. Cortland is entitled to an award of fees costs under the Public Records Act and as a prevailing party in this appeal

Should Mr. Cortland prevail on appeal on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

RCW 42.56.550(4) of the PRA provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

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

The Washington State Supreme Court in *Limstrom v. Ladenburg*,

136 Wn. 2d. 595, 616 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees – “[including] fees on appeal” – to the requestor. Should Mr. Cortland prevail on appeal on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

VI. REQUEST FOR RELIEF

This Court of Appeals must remand this case back down to the superior court to determine an appropriate penalty based upon the aggravating factors that were uncontested, but not considered at the superior court in the Order on Penalty, Attorney Fees, and Costs. CP 832-38.

This Court of Appeals must award Mr. Cortland’s attorney an additional one hundred and four thousand, two hundred (\$104,200.00) dollars in reasonable attorney’s fees from uncontested work at the superior court.

If Mr. Cortland prevails upon this appeal, he should be awarded all of his costs and reasonable attorney’s fees.

Certificate of Service

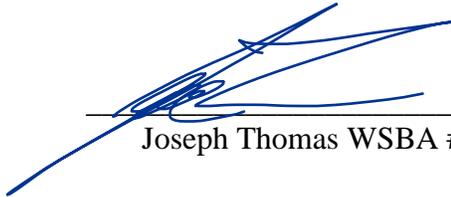
I declare under penalty of perjury under the laws of the State of Washington that on the date specified below, I caused to be served a copy of the following documents via email through the Court of Appeals electronic portal:

- Brian Cortland's Opening Brief

To the following:

Mr. Eric Eisenberg
Lewis County Prosecuting Attorney
345 W. Main Street
Chehalis WA 98532

Dated this 29 day of June, 2018.



Joseph Thomas WSBA # 49532

LAW OFFICE OF JOSEPH THOMAS

June 29, 2018 - 3:18 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51987-9
Appellate Court Case Title: Brian Cortland, Appellant/Cross Respondent v. Lewis County, Respondent/Cross Appellant
Superior Court Case Number: 16-2-03960-7

The following documents have been uploaded:

- 519879_Briefs_20180629151557D2798447_8256.pdf
This File Contains:
Briefs - Petitioners
The Original File Name was 2018.07.01 Opening Brief.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- eric.eisenberg@lewiscountywa.gov
- fightpubliccorruption@yahoo.com
- lori.cole@lewiscountywa.gov

Comments:

Sender Name: Joseph Thomas - Email: joe@joethomas.org
Address:
14625 SE 176TH ST APT N101
RENTON, WA, 98058-8994
Phone: 206-390-8848

Note: The Filing Id is 20180629151557D2798447