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Court of Appeals  
Division II  
State of Washington  
10/4/2018 4:49 PM  
No. 51987-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**BRIAN CORTLAND,**

Appellant / Cross-Respondent,

vs.

**LEWIS COUNTY,**

Respondent / Cross-Appellant.

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Appeal from the Superior Court of Washington for Thurston County

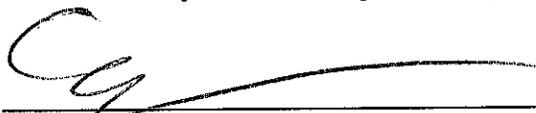
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**Lewis County's Cross-Appellant Reply Brief**

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## I. ARGUMENT

### A. **Procedural bars do not prevent Lewis County's argument that the requests here sought judicial records from a nonexistent agency.**

Mr. Cortland argues that Lewis County is procedurally barred from litigating its cross-appeal in this case, raising waiver, invited error, and failure to challenge certain facts. These arguments fail; Lewis County has pressed and may continue to press its claims on appeal.

Lewis County did not waive any argument by complying with the trial court's order while it pursued this appeal. Since the beginning of the case, it argued that the law library or its board were judicial institutions and their records were judicial records. CP at 9-10 (answering that the records plaintiff requested were records of the Superior Court governed by GR 31.1). The trial court specifically contemplated that Lewis County might appeal its merits ruling to the contrary, alluding to it during the very exchange Mr. Cortland cites: "[F]or the purpose of making sure that this record is clear here, *at this point, unless and until that order is reversed or somehow mooted*, you are responding to public records requests as they would come in." VRP at 27 (emphasis added). What the judge is talking about, and what the written order reflects, is Lewis County's truthful

representation that it had provided<sup>1</sup> and would provide records in response to later requests for Law Library Board records as opposed to not providing them. See *id.* at 26-27. The trial court did not expect Lewis County to be estopped from appealing, for an appeal is the only mechanism by which the trial court's order might be reversed. Rather, this exchange represents the humdrum principle that a party is bound by an adverse ruling pending appeal, unless it is specifically stayed. See VRP at 26 (asking how Lewis County will respond to records requests "pending the possibility of a reversal by a higher court of this Court's *currently binding* ruling" (emphasis added)); RAP 8.1 (requiring a motion in the appellate court to stay nonmonetary portions of a civil order below). The Court should reject Mr. Cortland's waiver argument.

Mr. Cortland's invited-error argument makes even less sense. The most typical case of invited error is when a party seeks reversal because its own proposed jury instruction was unlawful. See generally *State v. Henderson*, 114 Wn.2d 867, 792 P.2d 514 (1990). The doctrine turns on whether a party has created the error below by

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<sup>1</sup> Mr. Carter referred to another case before the same judge in which the Lewis County Superior Court provided records under GR 31.1 in response to later requests by Mr. Cortland. VRP at 26. The judge ruled that this response satisfied Lewis County's duties under the PRA consistent with his ruling in this case—a decision Mr. Cortland appealed in Court of Appeals No. 52066-4-II.

affirmatively arguing for it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). In contrast, Lewis County consistently argued that the records requested here were judicial records not subject to the PRA. CP at 9-10; 23-36, 209-13. It argued that the Lewis County Superior Court was running the law library, and so the records of its administration were judicial; it argued that the Law Library Board did not exist at the time of the request, and was a judicial agency when it existed for several historical, statutory, and constitutional reasons. The trial court erroneously overruled these positions. Lewis County did not “invite” this error by noting truthfully that it was producing records in response to future requests for law library records. Compliance with an adverse court ruling does not waive one’s right to challenge it. The Court should reject the invited error claim.

Finally, Mr. Cortland argues that Lewis County’s failure to challenge a finding of fact precludes its appeal. No findings of fact, challenged or not, control this court’s decision on the legal issues Lewis County raises. It was undisputed below that Mr. Cortland submitted requests for records pertaining to the Lewis County Law Library Board, and it was undisputed that Chief Civil Deputy Glenn Carter wrote letter responses to Mr. Cortland. CP at 2-3 (¶¶10-12), 5 (¶25); CP at 11 (¶9), 14 (¶18). The question is what legal

significance those facts have: was a response necessary if the Law Library Board did not exist at the time of the request, and was Mr. Carter's response on behalf of the Superior Court under GR 31.1 a lawful response? The trial court concluded as a matter of law that a response from Lewis County was necessary and Mr. Carter's was insufficient. Lewis County assigned error to these legal conclusions and is permitted to argue its case. The Court should address the merits and hold the court below to have been mistaken.

**B. Lewis County did not have a duty to respond to a PRA request to a nonexistent agency whose duties had been taken over by the Lewis County Superior Court for five years preceding the request.**

Mr. Cortland argues that Lewis County has a duty to respond to each PRA request it receives, regardless of subject matter. This assumes that Lewis County is the recipient of the request. An agency need not go outside its own records to locate requested records. *Koenig v. Thurston County*, 151 Wn. App. 221, 233, 211 P.3d 423 (2009). Here, the request was to the Law Library Board, which was under the Lewis County Superior Court: at the time of the request, the Superior Court had taken over the law library and its Board and had been in control of the relevant records for five years. CP at 380. The PRA applies to records as they exist at the time of

the request. *Bldg. Indus. Ass'n of Wash. (BIAW) v. McCarthy*, 152 Wn. App. 720, 740, 218 P.3d 196 (2009). It cannot be blind to the fact that for five years, the requested records were under the control of another agency.

If Lewis County were to receive a request addressed to the City of Tacoma or Child Protective Services, it should forward the request to the appropriate agency for response. So too here: forwarding the request to the Superior Court for answer was appropriate, especially when the recipient of the request was a deputy clerk whose role was split between work for Lewis County and work as an ex officio deputy Superior Court clerk. CP at 383; Wash. Const. Art IV, § 26. Interpreting the request to be the agency actually in control of the records for five years, whose employee received it, would not undermine or narrowly construe the Public Records Act. Nor would holding that when an agency ceases to exist, the successor agency that assumes control over those records has the duty to respond to requests for such records. These holdings would apply the already-settled rule that the PRA governs access to records as they exist at the time of the request, and cannot penalize whether they ought to have been stored or maintained differently. *BIAW*, 152 Wn. App. at 740; *West v. Dep't of Nat. Res.*, 163 Wn.

App. 235, 244-46, 258 P.3d 78 (2011), *rev. denied*, 173 Wn.2d 1020 (2012).<sup>2</sup> The trial court improperly stretched the PRA to apply it here; this Court should reverse.

**C. The presence of the word “county” in the County Law Library statutes does not mean that Law Library Boards or their records are nonjudicial.**

Mr. Cortland specifically relies on the word "county" in the County Law Library statutes to indicate that Law Library Boards are not judicial. This is no more probative than that the word “county” appears in the title of the Lewis County Superior Court (more properly called the Superior Court of Washington in and for Lewis County), or that such judges are elected by county voters to serve in county-situated superior courts. See Wash. Const. art. IV, § 5; RCW 2.08.060-.065 (delineating the judges by county). A county pays half of a Superior Court Judge's salary through the county auditor. Wash. Const. Art. IV, §13; RCW 2.08.100. And yet, superior court judge is a state office and is clearly in the judiciary. See *Parker v. Wyman*, 176 Wn.2d 212, 221-22, 289 P.3d 628 (2012); GR 31; GR 31.1.

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<sup>2</sup> This rule is borne out in the unpublished cases holding it inappropriate to interpret the PRA to punish violations of the records retention laws. *Jones v. Dep't of Corr.*, No.33920-3-III, 2016 Wash. App. LEXIS 1955, at \*11-12 (Ct. App. Aug. 18, 2016), *rev. denied* 187 Wn.2d 1020 (2017); *Dep't of Corr. v. Barstad*, No. 47669-0-II, 2015 Wash. App. LEXIS 2692, at \*1-2, 5-7 (Ct. App. Nov. 3, 2015), *rev. denied* 185 Wn.2d 1015 (2016); *Reid v. Pullman Police Dep't*, No. 31039-6-III, 2014 Wash. App. LEXIS 207, at \*9 (Ct. App. Jan. 28, 2014).

The fact is that by their history, county law libraries have been under the direction of the superior court and have served a judicial function. The original county law library in Lewis County was under exclusive judicial control; the judges administered a fund of court fees to create a private library subject to their rules. Laws of 1925, ex. s. Ch. 94 at §§ 1, 3. The library in Lewis County was accessible only via private stairways within the court—it was the judges' library, not anyone else's. Julie McDonald Zander, THESE WALLS TALK: LEWIS COUNTY'S 1927 HISTORIC COURTHOUSE (Chapters of Life 2014) at 32. It is simply not the case the term "county law library," which was used in that 1925 Act (and before and since), means that the library is outside of the Superior Court present in each county. On the contrary, the modern statute requires that regional county law libraries site a library at each counties' superior court. RCW 27.24.062. The Constitution distributes the Superior Courts into each county—county law libraries merely follow that distribution.

For the same reason, it is not particularly meaningful that the attorney general's office opined that a county law library should be audited as a part of the county as opposed to a separate, stand-alone entity. It is not one; it is part of the Superior Court's insertion into each county. The Superior Court itself is audited as part of the

county as well. See, e.g., Wash. State Auditor's Office, Accountability Audit Report: Lewis County (Sept. 29, 2016) at 4 (including Superior Court in the Lewis County audit), *available at* <http://portal.sao.wa.gov/ReportSearch/Home/ViewReportFile?arn=1017569&isFinding=false&sp=false> .

The real question is not whether county law libraries are part of the state or county government, but whether they are *judicial*. Lewis County's prior cross-appeal brief lays out how law libraries have always been regarded as judicial in the State of Washington, starting even before statehood with the law portion of the territorial library. There is no indication that the legislature intended to change law libraries' judicial status over the years: just like the original state law library, the county law library is *not* a public library, but is for the benefit of the county officials, judges, and lawyers unless opened to the public. RCW 27.24.067. It is funded by court fees and governed by judges and lawyers. RCW 27.24.020, -.070. Ultimately, nothing about being "in the county" is inconsistent with being part of the judicial branch. A municipal court is part of a municipal government, but also indisputably judicial. See RCW 3.50.010 (situating municipal courts within cities); RCW 3.50.050 (giving the city legislative authority the right to make municipal-judge positions

elective offices); *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009) (holding municipal court judicial records not to be subject to the PRA). County law libraries by their history, function, statutory framework, and governance are judicial entities closely connected with the Superior Court. They are judicial regardless of whether they are “in the county.” Judicial records are subject to GR 31 and GR 31.1, not the Public Records Act. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). Accordingly, the Court should reverse the trial court application of the PRA to this request for law library records.

**D. Lewis County was permitted to raise new legal authority to support its argument, made throughout this case, that the requested records were judicial records.**

Both the trial court below and Mr. Cortland on appeal assert that Lewis County could not cite certain case law or the state constitution because these are “new arguments.” In its Answer, Lewis County pleaded as an affirmative defense (1) that the law library board was not a division or agency of Lewis County; and (2) that the Washington Superior Court is not a public agency for purposes of the Public Records Act, but rather is subject to GR 31 and GR 31.1. CP at 17-18 (¶¶4, 10). A civil litigant is not required to identify and plead in its answer every case, statute, or

constitutional provision that ultimately supports its defenses asserted therein. CR 8(e)(1), (f) (“Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.”). As any litigant should, Lewis County continued to produce further legal authority—not based on different operative facts—to support its positions that the request to the Law Library Board was a request for judicial records. There is a difference between new authority for an argument, which is permitted, and a new argument, which may not be permitted. See, e.g., RAP 10.8 (permitting a statement of additional authorities any time before final decision).

At the end of the day, the law has a strong preference for deciding cases correctly on their merits. When a litigant makes an argument and then fleshes it out with further legal authority before a final decision on the merits, the argument is preserved for consideration. *Reitz v. Knight*, 62 Wn. App. 575, 581 n.4, 814 P.2d 1212 (1991). Although it was convenient to say that Lewis County’s substantial historical and constitutional analysis was “new” and need not be considered, Lewis County was already arguing the history of the law library statutes and the structure of the constitution in its opening summary judgment brief. CP at 26-36. The trial court

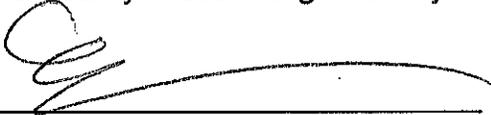
abused its discretion by waving its hand at these arguments instead of considering them. Properly considered, the requests in this case were directed to a judicial agency under the control of the Superior Court—especially so, since the Superior Court had specifically taken control of the agency and its records for five years preceding the request. They were requests for judicial records not subject to the PRA, and the trial court’s decision to punish Lewis County under the PRA for the Superior Court’s response was incorrect. This Court should reverse.

## II. CONCLUSION

Mr. Cortland submitted records requests to the Lewis County Law Library Board, an entity that had not existed for five years before his requests. The Law Library Board was under the Lewis County Superior Court’s control before it disbanded, and the Superior Court had assumed control of its records and its administration of the law library. The history of law libraries in Washington, as well as their statutory framework and constitutional background, show that they are in the judicial branch of government. The trial court erred in holding that the Public Records Act, as opposed to GR 31.1, governs access to the law library board’s records in Lewis County. Accordingly, this Court should reverse.

RESPECTFULLY submitted this 4 day of October, 2018.

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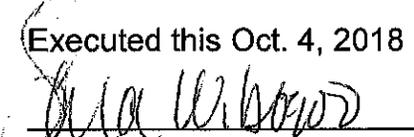
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I served a copy of this Response Brief on the Appellant by emailing it to his attorney, Joseph Thomas, through the mandatory court e-filing system at his email address of joe@joethomas.org.

Executed this Oct. 4, 2018 in Chehalis, WA:

  
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**LEWIS CTY PROSECUTING ATTY'S OFFICE**

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**Appellate Court Case Title:** Brian Cortland, Appellant/Cross Respondent v. Lewis County, Respondent/Cross Appellant  
**Superior Court Case Number:** 16-2-03960-7

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