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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

BRIAN CORTLAND,

Appellant,

v.

LEWIS COUNTY,

Respondent.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

The Public Records Act places strict requirements on how agencies respond to Public Records Act requests to ensure that a citizen receives the knowledge about government he seeks. It is only through the Public Records Act which the people “maintain control over the instruments that they have created.” RCW 42.56.030. The people are only able to maintain control over their documents through the mandatory statutory duties the Public Records Act places upon agencies. Without the mandatory statutory duties placed upon agencies in the Public Records Act, producing documents would be permissive and not mandatory. It is also the same when non-agencies produce documents. When non-agencies produce documents under the Public Records Act producing documents becomes permissive. Non-agencies are not included in the Public Records Act and consequently are not subject to the mandatory statutory duties of the Public Records Act.

This is a case of first impression where a non-agency responded to a Public Records Act request. The trial court ruled the non-agency response was enough to satisfy the mandatory statutory requirements of the Public Records Act.

Whether a non-agency can satisfy the mandatory statutory requirements of the Public Records Act, goes to the heart of the statute. If

a non-agency can satisfy the requirements of the Public Records Act, without being subject to the mandatory statutory requirements of the Public Records Act, then the Public Records Act would become ineffective. The cause and effect of having a non-agency respond would render the Public Records Act useless.

II. ASSIGNMENT OF ERROR

1. The trial court erred as a matter of law in failing to make sufficient findings of fact that the Lewis County Superior Court responded to Mr. Cortland's Public Records Act requests. CP 316-19.

2. The trial court erred as a matter of law in ruling that the Lewis County Superior Court can perform functions of a Public Records Act agency because it does not have any statutory authority to action and it would violate the doctrine of stare decisis. CP 316-19.

3. The trial court erred in ruling in ruling there was an adequate search because 1. Because it ruled a non-agency can perform a search satisfying the requirements of the Public Records Act; 2. The trial court failed to utilize and rule on the evidentiary burden of beyond a material doubt. CP 316-19.

III. STATEMENT OF ISSUE

1. Does a trial court have to make a finding of fact regarding the response to a Public Records Act request, pursuant to RCW 42.56.520, when the adequacy of the response is at issue in the lawsuit?
2. Can a non-agency without any statutory authority perform the functions of an agency subject to the Public Records Act? Does the doctrine of stare decisis bar the judiciary from performing functions of an agency subject to the Public Records Act?
4. Did the trial court err by ruling non-agencies can satisfy an agency's burden of conducting an adequate search for records under the Public Records Act? Did the trial court err in ruling Lewis County performed an adequate search under the Public Records Act, when Lewis County did not perform its mandatory burden of arguing it performed an adequate search beyond a reasonable doubt?
5. Whether Mr. Cortland is the prevailing party upon appeal and entitled to all costs and reasonable attorneys fees?

IV. STATEMENT OF THE CASE

Between August and September 2016, Mr. Cortland made public records requests seeking documents concerning the Lewis County Law Library and the Lewis County Law Library Board. CP 2, ¶ 4; CP 3-4 ¶ 11;

CP 6-7, ¶ 18. These requests were submitted to the Lewis County Law Library Board. CP 316.

Neither Lewis County Law Library Board nor Lewis County responded to Mr. Cortland's Public Records Act requests. Only the Lewis County Superior Court responded to Mr. Cortland's Public Records Act requests. CP 29; CP 31-32; CP 34; CP 37; CP 53. The Lewis County Superior Court responded not under the Public Records Act, but under GR 31.1. CP 317; CP 181-84. Mr. Cortland never received a response under the Public Records Act from either the Lewis County Law Library Board or Lewis County. As part of the Lewis County Superior Court's response to Mr. Cortland's Public Records Act requests, the Lewis County Superior Court performed a search for records it deemed responsive. CP 289; CP 266-67 (interrogatory 13). The Lewis County Superior Court even produced the documents under GR 31.1 that it deemed responsive to Mr. Cortland's Public Records Act requests. CP 29; CP 53.

Mr. Cortland never received a response pursuant to RCW 42.56.520 from either the Lewis County Law Library Board or Lewis County. CP 29.

V. ARGUMENT

1. **The trial court erred as a matter of law in failing to make sufficient findings of fact that the Lewis County Superior Court responded to Mr. Cortland's Public Records Act requests**

The record from the trial court is absent of any finding of fact identifying who responded pursuant to RCW 42.56.520 to Mr. Cortland's Public Records Act requests at issue in this lawsuit. In the alternative, if the trial court did rule as a matter of fact that Lewis County responded to Mr. Cortland's Public Records Act requests, it erred. This Court of Appeals should make the finding that the Lewis County Superior Court responded to Mr. Cortland's Public Records Act requests. Consequently, Lewis County violated the Public Records Act by not responding.

The trial court was required to make a ruling on Lewis County's response, if any, under the Public Records Act because responses under the Public Records Act are required under the plain language of RCW 42.56.520. 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”).

Here there is no finding of fact of whether Lewis County as the agency subject to the Public Records Act provided a response to Mr. Cortland’s Public Records Act requests. CP 316-17. The trial court only found as a matter of fact that “Mr. Cortland received timely responses and records to each request.” CP 317. Absent from the findings of fact is who provided the response. Who responded to this Public Records Act request is a hugely important fact because if the Lewis County Superior Court responded, as all the evidence in this case identifies, then it is a per se violation of the Public Records Act because only agencies can respond. As the plain language of the statute states: “[r]esponses to requests for public records shall be made promptly by agencies.” RCW 42.56.520(1).

Since the record consists only of affidavits, memoranda of law, and other documentary evidence, de novo is the proper standard of review to determine if Lewis County, as an agency subject to the Public Records Act responded to Mr. Cortland’s Public Records Act requests.

“Agency actions under the PRA are subject to de novo review. RCW 42.56.550(3).” *Neighborhood Alliance of Spokane Cty. v. Cty. of*

Spokane, 261 P. 3d 119, 128 (Wash. 2011). “On review, we take into account the policy of the PRA that free and open examination of public records is in the public interest, even if examination may cause inconvenience or embarrassment. RCW 42.56.550(3).” *Id.*

Where the “record consists only of affidavits, memoranda of law, and other documentary evidence” de novo review is appropriate as the appellate court stands in the same position as the superior court and is not bound by the superior court's factual findings on disputed facts. *O'Connor v. DSHS*, 25 P. 3d 426, 431 (Wash. 2001); *PAWS v. UW*, 125 Wn.2d 243, 252 (1994); *DeLong v. Parmelee*, 236 P. 3d 936, 948 (Wash. Ct. App. 2010).

Here is there no evidence in the record that either the Lewis County Law Library Board or Lewis County responded to Mr. Cortland’s Public Records Act requests. Either the Lewis County Law Library Board or Lewis County was required by statute to respond to Mr. Cortland’s Public Records Act request. RCW 42.56.520; *Belenski v. Jefferson County*, 378 P. 3d 176, 179 (Wash. 2016).

By Lewis County’s own admission, the Lewis County Superior Court directly responded to Mr. Cortland’s Public Records Act requests at issue in this lawsuit. “Defendant [Lewis County] affirmatively alleges that the Washington Superior Court in and for Lewis County timely

responded to each such request and produced the requested records to plaintiff that the Court had in its possession and control.” CP 29. “By letters dated August 8, 2016 and August 24, 2016 and attached as **Exhibits 1 and 2** to this answer, the Superior Court to each of plaintiff’s requests and provided the responsive records, as alleged in paragraph 13 of this answer.” CP 31-32(emphasis in original). “Defendant alleges that, on August 23, 2016, the Superior Court initially and timely responded to each of plaintiff’s requests.” CP 34. “Defendant further alleges that, by letter dated September 02, 2016 . . . the Superior Court further answered plaintiff’s request, stating that there were no records responsive to requests (3), (5), (7), and (11).” CP 34. “Answering paragraphs 33 and 34, defendant admits the Court responded to plaintiff’s records request by providing records. On August 24, 2016, the Superior Court responded to each of plaintiff’s requests as stated in **Exhibit 5** and as alleged in paragraph 26 of this answer.” CP 37 (emphasis in original). Defendant “incorporates by reference paragraphs 1 through 71 of this answer and **exhibits 1 through 11** to this answer establishing that the Court provided the requested records along with the Court’s timely responses to plaintiff.” CP 53 (emphasis in original). It is without a doubt that Lewis County argued that the Lewis County Superior Court searched, responded to and

produced the records responsive to Mr. Cortland's Public Records Act requests at issue in this lawsuit.

Mr. Cortland filed a declaration later in the lawsuit acquiescing to Lewis County's affirmative statements in the Answer. *See* CP 180-223. Mr. Cortland testifies throughout his declaration that the responses he received expressly stated that the Lewis County Superior Court responded to his Public Records Act requests at issue in this lawsuit. CP 180-85.

The record is absent that Lewis County responded pursuant to RCW 42.56.520 to Mr. Cortland's Public Records Act requests at issue in this lawsuit.

Since the record consists only of affidavits, memoranda of law, and other documentary evidence de novo review is the appropriate standard.

It is untenable for the trial court or for this Court of Appeals to rule for anything other than the Lewis County Superior Court, and only the Lewis County Superior Court, responded to Mr. Cortland's Public Records Act requests at issue in this lawsuit.

Mr. Cortland is the prevailing party in this lawsuit because "[t]he PRA 'treats a failure to properly respond as a denial.'" *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011) (quoting *Soter v. Cowles Publ'g Co.*, 174 P.3d 60, 78 (2007)).

2. The trial court erred as a matter of law in ruling that the Lewis County Superior Court can perform functions of a Public Records Act agency because it does not have any statutory authority to action and it would violate the doctrine of stare decisis

The Lewis County Superior Court is not an agency subject to the Public Records Act. The Washington State Supreme Court has repeatedly construed the statutory term of ‘agency’ to not include the judiciary. Because the judiciary is not included in the statutory term of agency, it has no authority to act under the Public Records Act and all acts by the judiciary under the Public Records Act are null and void.

For past thirty-two years, Washington Courts have repeatedly held that the judiciary is not an agency subject to the Public Records Act. *City of Federal Way v. Koenig*, 217 P. 3d 1172, 1174 (Wash. 2009) (holding “the PRA does not apply to the judiciary and the legislature acquiesced to that decision by not modifying the PRA”); *Nast v. Michels*, 107 Wn.2d 300, 307 (1986) (holding “the PDA does not apply to court case files because the common law provides access to court case files, and because the PDA does not specifically include courts or court case files within its definitions”); *Spokane & Eastern Lawyer v. Tompkins*, 150 P. 3d 158, 161 (Wash. Ct. App. 2007) (concluding “the Spokane County Superior Court is not an agency under the PDA”); *Beuhler v. Small*, 64 P. 3d 78, 81 (Wash. Ct. App. 2003) (stating “*Nast* held, a public citizen must look to the common law and

the discretion of the trial court for inspection of judicial records” to determine if the records are subject to the Public Records Act).

The Lewis County Superior Court is unquestionably part of the judiciary, which is not subject to the Public Records Act. *See e.g. Spokane & Eastern Lawyer v. Tompkins*, 150 P. 3d 158, 161 (Wash. Ct. App. 2007) (concluding “the Spokane County Superior Court is not an agency under the PDA”). Because the Lewis County Superior Court is not an agency subject to the Public Records Act, there is no inclusion in the law giving the Lewis County Superior Court any authority to act under the Public Records Act. Case law is clear that when an entity is not included in the law, its actions are null and void.

Here the trial court ruled that the Lewis County Superior Court could perform the mandatory statutory duties of an agency when satisfying Mr. Cortland’s Public Records Act requests at issue in this lawsuit. The trial court ruled that Mr. Cortland received timely responses to his Public Records Act requests, but the only responses he received were from the Lewis County Superior Court.¹ Since agencies must respond to Public

¹ By Lewis County’s own repeated admission, only the Lewis County Superior Court responded to Mr. Cortland’s Public Records Act requests at issue in this lawsuit. “Defendant [Lewis County] affirmatively alleges that the Washington Superior Court in and for Lewis County timely responded to each such request and produced the requested records to plaintiff that the Court had in its possession and control.” CP 29. “By letters dated August 8, 2016 and August 24, 2016 and attached as Exhibits 1 and 2 to this answer, the Superior Court to each of plaintiff’s requests and provided the responsive records, as

Records Act Requests, pursuant to the plain language of RCW 42.56.520(1), the Lewis County Superior Court was not included in the statute and therefore could not have provided a response. “An agency may exercise only those powers conferred by statute, and cannot authorize action in absence of statutory authority.” *Pope Resources, LP v. Washington DNR*, 389 P. 3d 699, 708 (Wash. Ct. App. 2016) (quoting *Northlake Marine Works, Inc. v. State, DNR*, 138 P. 3d 626, 631 (Wash. Ct. App. 2006) (citing *Surveyors & Engrs. LLC, v. Friends of Skagit County*, 135 Wn. 2d. 542, 558 (1998))).

If the Lewis County Superior Court is not an agency for the purposes of the Public Records Act, and the Public Records Act does not apply to it, then any actions it took were ultra vires and constitute an unauthorized act and not recognizable under the Public Records Act. Unauthorized acts are void and are of no legal effect. *See Campbell v. State, Department of Social and Health Services*, 83 P. 3d 999, 1008 (Wash. 2004) (stating there was

alleged in paragraph 13 of this answer.” CP 31-32. “Defendant alleges that, on August 23, 2016, the Superior Court initially and timely responded to each of plaintiff’s requests.” CP 34. “Defendant further alleges that, by letter dated September 02, 2016 . . . the Superior Court further answered plaintiff’s request, stating that there were no records responsive to requests (3), (5), (7), and (11).” CP 34. “Answering paragraphs 33 and 34, defendant admits the Court responded to plaintiff’s records request by providing records. On August 24, 2016, the Superior Court responded to each of plaintiff’s requests as stated in Exhibit 5 and as alleged in paragraph 26 of this answer.” CP 37. Defendant “incorporates by reference paragraphs 1 through 71 of this answer and exhibits 1 through 11 to this answer establishing that the Court provided the requested records along with the Court’s timely responses to plaintiff.” CP 53.

“no authority to expand the definition of developmental disability beyond what the legislature has permitted”); *Erection Co. v. Labor & Industries*, 121 Wn.2d 513, 519 (1993) (stating “An agency may exercise only those powers granted to it by the Legislature”).

The Public Records Act require agencies, and only agencies, to take action when responding to requests and producing responsive records. *See* RCW 42.56.070(1) (stating agencies “**shall** make available for public inspection and copying all public records”); RCW 42.56.080(2) (stating “agencies **shall**, upon request for identifiable public records, make them promptly available to any person”); RCW 42.56.090 (stating “Public records **shall** be available for inspection and copying during the customary office hours of the agency”); RCW 42.56.100 (stating “Agencies **shall** adopt and enforce reasonable rules and regulations”); RCW 42.56.210(3) (stating “Agency responses refusing, in whole or in part, inspection of any public record **shall** include a statement of the specific exemption authorizing the withholding”); RCW 42.56.520(1) (stating “[r]esponses to requests for public records **shall** be made promptly by agencies”).

The word “‘shall’ when used in a statute, is presumptively imperative and creates a mandatory duty unless a contrary legislative intent is shown.” *Goldmark v. McKenna*, 259 P. 3d 1095, 1099 (Wash. 2011);

Phil. II v. Gregoire, 128 Wash.2d 707, 713, (1996); *State v. Krall*, 125 Wash.2d 146, 148 (1994).

The doctrine of stare decisis bars this Court from changing this well-established construction of the Public Records Act that “judiciary is not included in the PRA's definition of ‘agency.’” *City of Federal Way v. Koenig*, 217 P. 3d 1172, 1172 (Wash. 2009). Washington courts “will overrule a prior decision only upon a clear showing that the rule it announced is incorrect and harmful.” *State v. WR, JR.*, 336 P. 3d 1134, 1139 (Wash. 2014); *State v. Barber*, 170 Wash. 2d 854, 863-65 (2011); *City of Federal Way v. Koenig*, 217 P. 3d 1172, 1174 (Wash. 2009) (a Public Records Act case). “This respect for precedent “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *City of Federal Way v. Koenig*, 217 P. 3d 1172, 1174 (Wash. 2009) (a Public Records Act case) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

Since the record is absent of any argument or ruling that identifies why the precedent set by *Nast v. Michels*, 107 Wn.2d 300 (1986) is both incorrect and harmful, this court is bound by past precedent holding the judiciary is not an agency, and it is up to the Washington Legislature to change the definition of agency, pursuant to RCW 42.56.010(1), if it so

chooses. Under the doctrine of stare decisis this court must rule that the Lewis County Superior Court could not act as an agency under the Public Records Act. Since only agencies are permitted to take action pursuant to the Public Records Act, non-agencies actions for the purposes of the Public Records Act is null and void.

3. The trial court erred in ruling in ruling there was an adequate search because 1. Because it ruled a non-agency can perform a search satisfying the requirements of the Public Records Act; 2. The trial court failed to utilize and rule on the evidentiary burden of beyond a material doubt

The trial court deviated, without explanation, from well-established case law under the Public Records Act and the Freedom of Information Act when permitting a non-agency to perform a search to satisfy the requirements of the Public Records and failed to apply the evidentiary standard of “beyond a reasonable doubt” when determining if an adequate search was made. As a matter of law, an agency’s “failure to perform an adequate search precludes an adequate response and production,” consequently resulting in a violation of the Public Records Act. *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011). Because Lewis County did not perform an adequate search under the Public Records Act, this Court of Appeals must reverse the trial court’s ruling and hold Lewis County violated the Public Records Act.

“[A]dequacy of a search for records under the PRA is the same as exists under FOIA.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011). Agencies must make a sincere and adequate search for records. RCW 42.56.100; *Fisher Broadcasting v. City of Seattle*, 326 P. 3d 688, 692 (Wash. 2014). “The adequacy of a search is judged by a standard of reasonableness,” on a case-by-case basis and “the search must be reasonably calculated to uncover all relevant documents.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011).

“**[T]he agency bears the burden, beyond material doubt, of showing its search was adequate.** To do so, the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* “A reasonably detailed affidavit, setting forth the search terms and the type of search performed... is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.” *DeBrew v. Atwood*, 792 F. 3d 118, 122 (D.C. Cir. 2015).

A. A necessary element of an adequate search under the Public Records Act is for the agency to perform the search

An adequate search under the Public Records Act is a non-delegable duty to non-agencies which are not subject to the Public Records Act. In other words, an agency subject to the Public Records Act has no legal

authority to assign its mandatory statutory duty of an adequate search to a non-agency. When an agency does not perform a search under the Public Records Act it is a violation of the requestor's statutory right to copy and inspect records, and a violation of the Public Records Act. The trial court erred when it did not find a violation of the Public Records Act.

The Washington State Supreme Court in the seminal Public Records Act search case *Neighborhood Alliance* unequivocally stated that the agency, and nothing but the agency must perform the search for responsive records under the Public Records Act. “[T]he agency bears the burden, beyond material doubt, of showing its search was adequate.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011). When the *Neighborhood Alliance* used the word its to describe whose search was adequate, the Court was referring to the agency. In this context, the word ‘its’ is relating to it or itself, which in this case is referring back to the ‘agency.’ Thus, in court the agency must show the agency’s search was adequate by meeting or exceeding the evidentiary standard of beyond a reasonable doubt. *Id.* This reading of the *Neighborhood Alliance* case is in accord with well-established Freedom of Information Act case law stating that agencies must perform the search. *See Boyd v. Executive Office for US Attorneys*, 87 F. Supp. 3d 58, 70 (D.C. Cir. 2015) (stating “[a]n agency fulfills its obligations under FOIA if it can demonstrate beyond

material doubt that its search was reasonably calculated to uncover all relevant documents”) (internal quotation marks omitted); *Miccosukee Tribe of Indians of Florida v. US*, 516 F. 3d 1235, 1248 (8th Cir. 2008) (stating FOIA requires “the agency must show beyond a material doubt ... that it has conducted a search reasonably calculated to uncover all relevant documents”); *Valencia-Lucena v. US Coast Guard*, 180 F. 3d 321, 326 (D.C. Cir. 1999) (stating in FOIA the “agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested”). The Freedom of Information Act case law is binding upon this Court of Appeals because the Washington State Supreme Court has “adopt[ed] Freedom of Information Act (FOIA) standards of reasonableness regarding an adequate search.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 122 (Wash. 2011).

By Lewis County’s own admission, an agency did not make a search. At the trial court, in its Response Merits Brief, Lewis County clearly expressed that a non-agency, the Lewis County Superior Court performed the search for records that were subsequently produced to Mr. Cortland’s Public Records Act requests at issue in this lawsuit. “This position ignores the fact that the Superior Court in fact searched for and produced records, and Mr. Cortland does not dispute receiving them. *See Answer at Ex. 1-11*;

Decl. of Brian Cortland (Jan. 4, 2018); Attachments 1 and 2 (Decls. Of Susie Parker and Matt Trent).” CP 289. In fact, when Lewis County makes its argument in the Response Merits Brief, not only does it unequivocally state as a fact that a non-agency performed the search for documents responsive to Mr. Cortland’s Public Records Act requests, but it cites extensively to the record, most of which is included in the clerk’s papers in this appeal. *See e.g.* CP 180-223 (Decl. of Brian Cortland (Jan. 04, 2018)).

Absent from the record is any identification that Lewis County made an adequate search – in fact, as stated above, Lewis County admitted the Lewis County Superior Court performed the search. Lewis County is an agency subject to the Public Records Act. RCW 42.56.010(1). Moreover, Lewis County is the Defendant in the lawsuit and had the burden under binding Washington State Supreme Court precedent that by beyond a reasonable doubt, Lewis County performed an adequate search for records. *See Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011).

The trial court erred as a matter of law when it ruled a non-agency can satisfy an agency’s mandatory duty of a reasonable search under the Public Records Act. Under well-established case law in the Public Records Act and the Freedom of Information Act, only agencies can perform searches.

Because an agency subject to the Public Records Act did not make a search, binding case law is clear that “[t]he failure to perform an adequate search precludes an adequate response and production. The PRA ‘treats a failure to properly respond as a denial.’” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011) (quoting *Soter v. Cowles Publ'g Co.*, 174 P.3d 60, 78 (2007)).

Lewis County violated the Public Records Act by not making the search. Since a failure to perform an adequate search precludes an adequate response, Lewis County did not adequately respond to Mr. Cortland’s request. Therefore, Lewis County violated Mr. Cortland’s right to inspect and copy documents under the Public Records Act and Mr. Cortland is the prevailing party as a matter of law.

B. Lewis County did not argue and the trial court did not rule Lewis County met its mandatory burden of proof of beyond a reasonable doubt

The record is absent of Lewis County arguing that it met its mandatory burden of proof of beyond a reasonable doubt to establish that an adequate search was performed by Lewis County. The words “beyond reasonable doubt” do not appear once in Lewis County’s Response Merits Brief. CP 286-99. The trial court erred in ruling that Lewis County performed an adequate search, when Lewis County did not argue, and the trial court did not rule that Lewis County met its mandatory burden of proof

beyond a reasonable doubt to establish an adequate search. Because Lewis County did not meet its mandatory burden of proof beyond reasonable doubt, and cannot establish it for the first time here, an adequate search was not performed, and Mr. Cortland is the prevailing party as a matter of law.

When the adequacy of a search is challenged under the Public Records Act, agencies have the mandatory burden of proof beyond reasonable doubt in order to establish an adequate search was performed. “[T]he agency bears the burden, beyond material doubt, of showing its search was adequate.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011). The standard is the same under the federal Freedom of Information Act. *See Boyd v. Executive Office for US Attorneys*, 87 F. Supp. 3d 58, 70 (D.C. Cir. 2015) (stating “[a]n agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents”) (internal quotation marks omitted). The Freedom of Information Act case law is binding upon this Court of Appeals because the Washington State Supreme Court has “adopt[ed] Freedom of Information Act (FOIA) standards of reasonableness regarding an adequate search.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 122 (Wash. 2011).

Under binding precedent from the Washington State Supreme Court Lewis County had the mandatory burden to argue beyond a reasonable doubt that it performed an adequate search. The record is absent of Lewis County making this argument. Mr. Cortland made clear in his Opening Merits Brief that Lewis County had the burden of proof beyond a reasonable doubt to establish an adequate search. CP 229-30 (stating in bold the burden of proof is beyond reasonable doubt).

Since the Court of Appeals sits in the trial court's shoes to review Public Records Act cases de novo, it would be impermissible for Lewis County to make this argument for the first time on appeal, when it failed to argue it in the trial court. RCW 42.56.550(3).

As a matter of law, Mr. Cortland is the prevailing party because Lewis County did not meet its burden of proof beyond reasonable doubt in the trial court.

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

RCW 42.56.550(4) of the PRA provides:

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

Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.” *Spokane Research Fund v. City of Spokane*, 117 P. 3d 1117, 1125 (Wash. 2005); *see also American Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503*, 95 Wn. App 106, 115 (1999). The PRA does not allow for court discretion whether to award attorney fees to a prevailing party. *PAWS v. UW (“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 in any respect, it should be awarded its fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

VI. REQUEST FOR RELIEF

Mr. Cortland requests the following relief from this Court of Appeals. First, this Court of Appeals must reverse the trial court’s ruling and hold Lewis County violated the Public Records Act by denying Mr. Cortland the right to copy and inspect records. Second, this case must be remanded back down to the trial court for Lewis County to perform an

adequate search under the Public Records Act, and subsequently, certify to the trial court that it met its burden of beyond a reasonable doubt of performing an adequate search for records responsive to each of Mr. Cortland's requests at issue in this lawsuit. Third, at a date yet to be determined, the trial court will have a penalty hearing where the aggravating and mitigating factors for the statutory penalty, pursuant to RCW 42.56.5550(4), will be argued. Fourth, the trial court will award Mr. Cortland a statutory penalty, all costs and reasonable attorney's fees pursuant (including those from this appeal), pursuant to RCW 42.56.550(4).

Respectfully submitted this 31 day of August, 2018.

By: _____



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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:

Eric.Eisenberg@lewiscountywa.gov

Mr. Eric Eisenberg
Lewis County Prosecuting Attorney's Office
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Joseph Thomas WSBA # 49532

LAW OFFICE OF JOSEPH THOMAS

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