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Division II
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No. 52066-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

BRIAN CORTLAND,

Appellant,

vs.

LEWIS COUNTY,

Respondent.

Appeal from the Superior Court of Washington for Thurston County

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Brief of Respondent Lewis County

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I. INTRODUCTION

Brian Cortland submitted Public Records Act (PRA) requests to the Lewis County Law Library Board in December of 2015 and August-September of 2016, the latter of which are the subject of this appeal. The Law Library Board had ceased to exist in 2010. For five years, the Lewis County Superior Court had assumed administration of the law library. The Superior Court fielded the requests, interpreted them as GR 31.1 requests, and responded to them. For the Dec. 2015 requests—the subject of a different lawsuit and appeal—the Superior Court declined to provide records. For the August-September 2016 requests at issue here, however, the Superior Court promptly provided responses and all responsive records. Mr. Cortland sued anyway, claiming a violation of the PRA. Because he timely received his requested records, the trial court rejected his claim. This Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

1. Appellant Mr. Cortland submitted PRA requests to the Lewis County Law Library Board, which had not existed for five years. If the Lewis County Superior Court promptly responded to his requests and provided all responsive records, was his request satisfied under the PRA?

2. When responding to a PRA request, may an agency fulfill its obligations by producing records without identifying the legal theory by which the documents are available?

3. Can an agency fulfill its obligations under the PRA through seeking help from a third party, outside of the agency?

4. Lewis County produced a reasonably detailed affidavit describing the search for records in this case, the thoroughness of which was undisputed. Did Lewis County carry its burden to show an adequate search?

III. STATEMENT OF THE CASE

Brian Cortland submitted the PRA requests at issue in this case to the Lewis County Law Library Board between August 2, 2016 and Sept. 13, 2016. Clerk's Papers (CP) at 316; *see also* CP at 180-84 (summarizing the requests and responses' dates). At the time, the Lewis County Law Library Board did not exist: it stopped functioning in 2010, and the Lewis County Superior Court had assumed direct administration of the law library. *Id.* at 250. Mr. Cortland knew this information: he learned it six months earlier, in response to PRA requests he made to the Lewis County Law Library Board on Dec. 9, 2015. *Id.* at 250-53. The Lewis County Superior Court had fielded those December requests, interpreted them as GR 31.1 requests, and declined to answer them unless resubmitted when GR 31.1 became effective a few weeks later. *Id.*; *see* GR 31.1 (effective Jan. 1, 2016).

For the August-September 2016 requests at issue in this case, however, the Lewis County Superior Court promptly

responded to each request and provided the responsive records. CP at 317; *see also id.* at 62-179 (showing the full responses); *id.* at 180-84 (admitting receipt of the responses). The responses said they were provided under GR 31.1. *Id.* at 317. This is because the Lewis County Superior Court believed the law library to be a judicial agency and its records to be judicial records. *See, e.g.*, *id.* at 63.

Mr. Cortland sued first on the Dec. 9, 2015 requests, in Thurston County Cause No. 16-2-03960-34. *See* CP at 250. There, the judge overruled Lewis County's argument that the law library board was a judicial agency and/or that the Lewis County Superior Court's records of administering the library for the five years were judicial records. Rather, he ruled that Lewis County had a duty to respond to PRA requests to the Law Library Board and that declining to respond had violated the PRA.[1] *Id.* at 250-57.

By then, Mr. Cortland had sued on the August-Sept 2016 requests in Thurston County Cause No. 17-2-04278-34. CP at 1. He alleged that he had received no response because he never received a response from Lewis County, as opposed to the Lewis County Superior Court. *Id.* at 2, 5, 11, 13-17, 19, 21. The case was heard

[1] This holding is a subject of the appeal in Court of Appeals No. 51987-9-II.

by the same judge who ruled on the prior matter. *Compare id.* at 319 *with id.* at 257.

On different facts, the judge ruled differently. Because the Lewis County Superior Court provided Mr. Cortland with prompt, complete responses to each request, Mr. Cortland had not suffered a denial of access giving rise to a PRA cause of action. *Id.* at 317-18. It did not matter that the production was ostensibly under GR 31.1 because the PRA does not require an agency to identify the legal theory by which records are available. *Id.* at 318. Nor did it matter that the Superior Court provided the records—Lewis County obtained a response from the entity that had the records, and providing the records satisfied its obligations. *Id.* The judge reasoned that previously, he held Lewis County responsible for the Lewis County Superior Court's failure to respond to a prior request; by the same token, when the Superior Court *did* respond, Lewis County was credited with it. *Id.*

Mr. Cortland also challenged the adequacy of the search for records in response to his August-Sept. 2016 requests. CP at 24 ¶ 10. Lewis County produced an affidavit describing the search. CP at 297-99. Mr. Cortland did not ultimately dispute the factual thoroughness of the search—for example, he did not suggest

locations that should have been searched or identify records that would have been found with a more thorough search. *Id.* at 293-94. Rather, he argued that no search had occurred because the wrong agency did it, similar to his argument that the response from the wrong agency did not count. *Id.* at 226, 230-33. The trial judge rejected the no-search argument for the same reasons he rejected the no-response argument. *Id.* at 318-19. He credited Lewis County's search evidence and found that it had carried its burden to show an adequate search. *Id.* Mr. Cortland timely appealed.[2]

IV. ARGUMENT

A. The Public Records Act entitles a person to promptly receive public records in response to a request. If the requestor receives such records, there is no violation—regardless of the legal theory by which records are provided.

Mr. Cortland received timely, complete responses to each of his requests. CP at 317. This unchallenged finding of fact is a verity on appeal. *State v. Flores*, 186 Wn.2d 506, 509 n.2, 379 P.3d 104

[2] The merits order was filed May 18, 2018, CP at 316; the notice of appeal on June 15. The notice of appeal is defective in not including a signed copy of the order under appeal, RAP 5.3(a), but such defects are irrelevant under RAP 5.3(f). Also, Mr. Cortland appeals only the final order, even though the final order merely recapitulated a ruling made on partial summary judgment. *See* CP 287-289. But, the Court has discretion to consider orders addressing the same legal issues. *S&K Motors, Inc. v. Harco Nat'l Ins. Co.*, 151 Wn. App. 633, 638-39, 213 P.3d 630 (2009). As such, Lewis County seeks to win this appeal on the merits, not on procedural grounds.

(2016). Because Mr. Cortland got the records he was seeking in direct response to his request, his claims fail. It does not matter if he got the records from Superior Court instead of Lewis County, nor that they were labelled "GR 31.1" instead "PRA." Mr. Cortland was not *denied access* to records, and the explanation by which records are produced does not create a cause of action. Reviewing these legal issues de novo, the Court should affirm.

1. *The PRA provides no cause of action arising from the production of records; only a denial of access is redressable.*

The Public Records Act is a strongly worded mandate for public disclosure, whose purpose is to encourage the production of records to inform the public about government. RCW 42.56.030; *Sanders v. State*, 169 Wn.2d 827, 849-50, 240 P.3d 120 (2010).

In line with this intent, the PRA shields agencies from liability arising from records' production, RCW 42.56.060, only granting a cause of action when there has been a denial of access:

> Upon the motion of any person *having been denied an opportunity to inspect or copy a public record* by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why *it has refused to allow inspection or copying* of a specific public record or class of records. The burden of proof shall be on the agency to establish that *refusal to permit public inspection and copying is in accordance with a statute*

> that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.56.550(1) (emphases added). Interpreting this language, this Court held that judicial review may follow only after a denial of a request, i.e., some final agency action "denying the request by not providing the responsive documents." *Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 936-37, 335 P.3d 1004 (2014); *accord John Doe v. Benton Cty.*, 200 Wn. App. 781, 789, 403 P.3d 861 (2017) ("[T]here is no cause of action under the PRA until after the agency has engaged in some final action denying access to a record."). Here, Mr. Cortland received his requested records in direct response to his request and makes no argument that he should have gotten more. Because he fails to show any denial of access to support a claim, the Court should affirm the judgment below.

2. *The legal theory by which records are produced does not give rise to a PRA cause of action.*

Although he admits receiving responses to all of his requests, CP at 180-85, Mr. Cortland argues that the responses did not "count" because they say they are made under GR 31.1 instead of the PRA. But, the verbiage accompanying the production of records does not afford him a cause of action.

The PRA permits one to satisfy a PRA request by "providing the record." RCW 42.56.520(1)(a).[3] It does not require any specific explanation accompanying the record. *See id.* In contrast, denials of records require "a written statement of the specific reasons therefor." RCW 42.56.520(4). The difference in wording is meaningful: the reasons by which an agency *produces* records, as opposed to *denying access* to records, is not grounds for an action. *See Ockerman v. King Cty. Dep't of Developmental & Envtl. Servs.*, 102 Wn. App. 212, 217, 6 P.3d 1214 (2000).

In *Ockerman*, an agency told a PRA requestor that he was not entitled to a PRA response because he was a litigant in a pending case with the agency, and so was limited to the rules of pretrial discovery. *Id.* at 214-15. But, the agency agreed to satisfy the request anyway and gave a time estimate. *Id.* The requestor sued, arguing that the agency failed to explain the delay in providing records. *Id.* The Court of Appeals held that no explanation for the reasonable time estimate was required: by the plain language of the statute, an explanation was required only for the denial of the request. *Id.* at 216-17. The agency had acknowledged the request

[3] A full copy of this provision is attached as Exhibit 1.

and given a reasonable time estimate for responding, which was the sum of its duty:

> Had the legislature intended that an explanation of the reasonable time estimate be included in the response, it could have said so. We note that the statute expressly requires an agency to provide a written statement of its specific reasons if it denies a record request. Reading these two provisions together, it is clear that the express requirement for an explanation under option (3) and the absence of such a requirement under option (2) was a conscious decision by the legislature.
>
> . . . .
>
> No interpretation of this statute, no matter how liberal, allows this court to modify by judicial fiat the plain wording of the statute. We decline to do so.

Id. at 217-18.

This was true even though the agency's response to the PRA request in *Ockerman* was legally incorrect. A civil litigant is not precluded from making PRA requests to an agency, even if he or she may also make discovery requests. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 910, 25 P.3d 426 (2001). But this point was irrelevant: because the agency had satisfied its duty to respond under the PRA, its incorrect explanation made no difference. *See Ockerman*, 102 Wn. App. at 220 (declining to address this issue as unnecessary). As a result, the theory or verbiage by which records are produced does not give rise to a PRA cause of action—producing the records satisfies the statute.

Here, as in *Ockerman*, the Lewis County Superior Court did not think that Mr. Cortland's request fell under the PRA, but it produced the records anyway. Identifying GR 31.1 as the theory for production, even if mistaken, does not provide a cause of action. *See Ockerman*, 102 Wn. App. at 220. Mr. Cortland's claim fails.

Ockerman's result encourages agencies to produce records even if the agency quibbles with the requestor's entitlement to the records. The legislature endorsed that approach by providing a liability shield for agencies that release records in good faith. RCW 42.56.060. Penalizing an agency for producing records under GR 31.1 if they were supposed to be available under the PRA does not further this statutory scheme. *Cf. Sanders v. State*, 169 Wn.2d 827, 849-50, 240 P.3d 120 (2010) (refusing to penalize agencies for producing wrongfully withheld records during litigation because the point of the PRA is to encourage them to produce records). PRA costs, attorney fees, and penalties are reserved for when an entity denies the requestor the right to inspect or copy the records, RCW 42.56.550(1), (4), not for when it finds an alternative avenue to give the requestor what he wants.

For this reason, Mr. Cortland's arguments about necessary findings of fact as to who performed the search and how they

explained the production to Mr. Cortland are non sequiturs. The trial court found the necessary fact, which is that Mr. Cortland promptly received a response and his requested records. That is the right the PRA protects, and it was satisfied. The Court should affirm.

B. The trial court did not overrule precedent in finding that Lewis County satisfied its PRA obligations in this case.

Mr. Cortland argues that the trial judge ignored years' of precedent in finding that the Lewis County Superior Court's response to his requests could satisfy any of Lewis County's obligations under the PRA. The trial judge did no such thing. He clearly understood the line of cases following *Nast v. Michels*, 107 Wn.2d 300, 307, 730 P.2d 54 (1986). *See* CP at 255-56 (analyzing these cases). But those cases address whether judicial records are accessible under the PRA and whether judicial agencies must comply with that act.[4] They do not address whether a judicial agency's provision of records to a requestor in response to a PRA request can satisfy a PRA

[4] *See, e.g.*, *Nast*, 107 Wn.2d at 304 ("Because the common law provides a right of access to court case files and because of the language of the public records section of the PDA, we hold the PDA does not provide access to court case files."); *see also Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (addressing "whether the judiciary is *subject* to the PRA" (emphasis added)); *West v. Wash. State Dist. & Mun. Court Judges' Ass'n*, 190 Wn. App. 931, 933, 361 P.3d 210 (2015) (exploring whether a judges' association was "*subject to* the Public Records Act" (emphasis added). These cases all deal with whether one may demand records from a judicial agency under the PRA, not whether a response, if given, can satisfy the PRA.

request. That question is much more directly answered in the statute itself, which says that "providing the record" satisfies the request and that only a denial of access creates a cause of action. *See* RCW 42.56.520(1)(a); RCW 42.56.550(1).

Besides, Mr. Cortland insists (and the trial judge agreed in the other case) that the Lewis County Law Library Board is a Lewis County PRA "agency," not a judicial agency. If so, the trial court held the Superior Court to have responded on the Law Library's/ Lewis County's behalf. CP at 318.

An agency may satisfy a PRA request through the acts of a third party. *See Benton Cty. v. Zink*, 191 Wn. App. 269, 282-83, 361 P.3d 801 (2015). In *Benton Cty*, the agency used an outside vendor to scan the requested records and billed the requestor for the actual costs. *Id.* at 273-74. The Court approved of the agency enlisting a third party to help provide a response to the request, noting the attorney general's model rule endorsing the procedure. *Id.* at 283-83 (citing former WAC 44-14-07001(5) (2015)). The new model rules similarly endorse use of an outside vendor in some circumstances, such as when the vendor has a better capacity to respond than the agency. WAC 44-14-07001 (2018). Frankly, any time an agency delivers records to a requestor through the mail or email, it uses a

third party (the federal government or an internet service provider) to respond to a request. *See* RCW 42.56.120(2)(a) (contemplating that an agency may respond through mail or electronic delivery and charge costs accordingly). PRA agencies are political bodies; they can only act through agents. *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 876, 357 P.3d 45 (2015). Sometimes those other than an agencies' employees act on its behalf—and the agency is credited with complying with its PRA obligations.

That is what happened here. The Lewis County Law Library Board had not existed for more than five years at the time of Mr. Cortland's PRA requests. The Superior Court had assumed law library administration, and it responded. Because Lewis County "obtain[ed] a response from the entity that it believed had access to and authority over the records," it complied with the PRA. CP at 318.

This rule makes sense generally, in that it encourages agencies to get records from the best source of them when it is ambiguous as to who should respond. *See Sanders*, 169 Wn.2d at 849 ("The PRA's purpose is to increase access to government records."). And it is particularly true on these facts, where the trial judge held Lewis County liable for the Lewis County Superior Court's failure to respond to the Dec. 9, 2015 requests. CP at 250-57. By

the same token, that Lewis County Superior Court's provision of records in response to a PRA request was *also* attributable to Lewis County to show its compliance. The point is to promote functional access to public records, not to draw formal distinctions about where the access comes from and how it is explained. The trial court's holding serves this goal. The Court should affirm.

C. The search's thoroughness was undisputed; Lewis County carried its burden to show its adequacy.

Mr. Cortland argues that Lewis County did not carry its burden to show an adequate search. He first argues that the search carried out by the Superior Court did not count because it was ultra vires, and second that the trial judge employed the wrong legal standard. Both arguments lack substance.

The Superior Court has authority to respond to records requests, which includes searching for records. *See* GR 31; GR 31.1. It did not act outside its powers in searching for what it thought were its records. Even if this action were ultra vires, Mr. Cortland asserts that Lewis County had the power to respond—and an agency may satisfy its PRA obligations through a third party with no power at all under the PRA, such as a commercial copying vendor or the U.S. Postal Service. *See Benton Cty.*, 191 Wn. App. at 282-83; WAC 44-14-07001; RCW 42.56.120(2)(a). So, Lewis County could enlist

the Superior Court to help search even if the Superior Court lacked any PRA authority.

It is irrelevant that this search was ostensibly under GR 31.1. Just as the PRA does not require an agency to specify the correct legal theory for a response, it does not require one to specify the correct legal theory for the search for records. *See generally* Ch. 42.56 RCW (making no mention whatsoever of the theory under which a search must take place); *Ockerman*, 102 Wn. App. at 216-18, 220. Although a failure to search adequately constitutes a denial of records on which an action may be predicated, *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011), when the requestor is the beneficiary of an adequate search, there is no denial and no cause of action, *Hobbs*, 183 Wn. App. at 936-37. Here, the factual thoroughness of the search was undisputed. Mr. Cortland's only claim was that the search was not done by the right people under the right law, not that it should have included more locations or found more records. The trial court properly rejected it.

Similarly, unsupported is Mr. Cortland's claim that the trial judge used the wrong legal standard when holding that Lewis County demonstrated an adequate search. Lewis County produced a

detailed affidavit describing the search. CP at 297-99. Mr. Cortland did not offer any reason whatsoever as to why its thoroughness was inadequate—for example, he did not suggest locations that should have been searched or identify records that would have been found with a more thorough search. *Id.* at 293-94. Rather, he argued that no search had occurred because the wrong agency did it, similar to his argument that the response from the wrong agency did not count. *Id.* at 226, 230-33. In light of the undisputed evidence that the search was reasonably calculated to uncover all of the responsive documents, the trial court found Lewis County to have carried its burden. CP at 318-19. There is no reason to believe that this holding abandoned the correct legal standard, which both Mr. Cortland and Lewis County cited in their briefing below. *See* CP at 229-30 (arguing *Neighborhood Alliance*'s beyond a material doubt standard); CP at 294 (arguing the same standard). The trial court simply rejected Mr. Cortland's legal objection to a search that was undisputedly thorough. This Court should affirm.

D. Mr. Cortland is not entitled to fees or costs on appeal.

A requestor who prevails against an agency on appeal may claim appellate costs and attorney fees. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 402, 314 P.3d 1093 (2013). But, because the

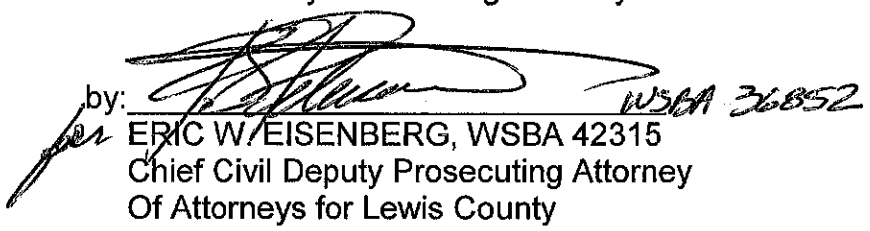
Court should affirm, Mr. Cortland will not prevail and should receive no costs or attorney fees.

V. CONCLUSION

Mr. Cortland got what the PRA entitles him to: prompt access to the records he requested. Because he was not denied access, the trial court properly rejected his PRA claims. This Court should affirm.

RESPECTFULLY submitted this October 1, 2018.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____ WSBA 36852
ERIC W. EISENBERG, WSBA 42315
Chief Civil Deputy Prosecuting Attorney
Of Attorneys for Lewis County

EXHIBIT 1

RCW 42.56.520 Prompt responses required.

(1) Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond in one of the ways provided in this subsection (1):

(a) Providing the record;

(b) Providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer;

(c) Acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request;

(d) Acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and asking the requestor to provide clarification for a request that is unclear, and providing, to the greatest extent possible, a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request if it is not clarified; or

(e) Denying the public record request.

(2) Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.

(3)(a) In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking.

(b) If the requestor fails to respond to an agency request to clarify the request, and the entire request is unclear, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Otherwise, the agency must respond, pursuant to this section, to those portions of the request that are clear.

(4) Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

LEWIS CTY PROSECUTING ATTY'S OFFICE

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Transmittal Information

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