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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**LEWIS COUNTY,**

Appellant,

vs.

**BRIAN CORTLAND,**

Respondent.

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Appeal from the Superior Court of Washington for Thurston County

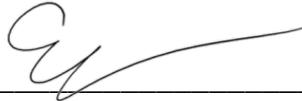
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**Appellant Lewis County's Opening Brief**

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## I. INTRODUCTION

Lewis County appeals the trial court's ruling that it violated the Public Records Act (PRA), Ch. 42.56 RCW, by failing to prove that its search for records responsive to Mr. Cortland's request was adequate. The trial court's ruling discounted unrebutted evidence in the record, misapplied recent precedent concerning final agency actions, and incorrectly required Lewis County to prove the adequacy of its search to Mr. Cortland during the pendency of its response to his request.

Specifically, Lewis County's response to the request was ongoing when the suit commenced, including communication about the response only one day beforehand. Lewis County continued to respond to the request until Mr. Cortland declined to claim an installment of records Lewis County offered to him after notice that doing so would abandon the request. Because Lewis County's response was ongoing, Mr. Cortland suffered no denial of access and had no PRA cause of action for an improper search or withholding. Moreover, he abandoned any entitlement to a further search for documents by abandoning the request. The Court should reverse the trial court's incorrect orders and direct entry of judgment for Lewis County.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in its August 3, 2018 Order on the Merits. Assignments 2 through 8 below also refer to this order.
2. The trial court erred in making Finding of Fact 8, that no affidavits or declarations of Lewis County's search were in the record, because the record included declarations under penalty of perjury by two people detailing Lewis County's search for records related to the request at issue in the lawsuit.
3. The trial court erred in failing to make three requested findings of fact, which showed that Lewis County continued to produce records to and communicate with Mr. Cortland regarding such production up until the day before this lawsuit was filed, and thereafter continued to offer records to him until he declined to claim an installment with notice that if he did so the request would be considered abandoned. Amongst the facts not found are that Lewis County produced 3600 records to the requestor after the incidents noted in the trial court's findings but before suit.
4. The trial court erred in making Conclusions of Law 13 through 15, that Lewis County failed its burden to show an adequate search, when Lewis County produced evidence that it was searching for and producing responsive records up to and after the time of suit—and only stopped when the requestor abandoned the request.
5. The trial court erred in its underlying reasoning for Conclusions of Law 13 through 15, stated in its oral ruling, that Lewis County was required to demonstrate the adequacy of its search to the requestor in an ongoing manner while its search and production of records was in progress.
6. The trial court also erred in making Conclusions of Law 13 through 15 because an agency has no duty to demonstrate the adequacy of a search before it is finished, and is relieved of demonstrating a search adequate to satisfy the whole request if the requestor abandons it midstream.
7. The trial court erred in making Conclusions of Law 16 and 18, that Mr. Cortland prevailed and was entitled to costs, penalties, and

attorney fees, because Lewis County did not fail to show an adequate search or violate the PRA.

8. The trial court erred in ordering Lewis County to perform a re-search for records responsive to the request because Lewis County had demonstrated an adequate search up to the point the request was abandoned, and Mr. Cortland was entitled to no further searching after he abandoned the request.
9. The trial court erred in not correcting the above errors when entering its Sept. 12, 2018 Order Denying Motion for Reconsideration.
10. The trial court erred in entering its Final Order and Judgment on Nov. 16, 2018 insofar as it was predicated on the prior erroneous rulings: if the trial court had correctly ruled that Lewis County had not violated the PRA, no penalties would follow.
11. The trial court erred in entering its Dec. 21, 2018 Order on Costs and Attorney Fees insofar as the order was predicated on the prior erroneous rulings: if the trial court had correctly ruled that Lewis County had not violated the PRA, no award of costs and attorney fees would follow.

### **III. ISSUES PRESENTED**

1. If an agency is continuing to produce records to a requestor in response to a PRA request, does it have a duty to demonstrate the adequacy of its search to the requestor while the response is ongoing?
2. If a requestor sues while an agency is continuing to produce such records, does the agency have a duty to prove the adequacy of its search notwithstanding the lawsuit being premature under *Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 936, 335 P.3d 1004 (2014)?
3. May a requestor abandon a PRA request by failing to claim an installment of records in the agency's ongoing response, and yet thereafter prevail on a lawsuit requiring the agency to demonstrate the adequacy of its search?

4. If a requestor sues while an agency's response to his or her request is ongoing and thereafter abandons the request, does the agency owe any further duty to search for responsive records to the request?
5. If a party who loses a pretrial ruling on a point of law stipulates to legal consequences following from that ruling in order to speed entry of a final judgment, making of record of its intent to appeal, is the party precluded from appealing?

#### **IV. STATEMENT OF THE CASE**

On Nov. 18, 2016, Brian Cortland made a Public Records Act (PRA) request to Lewis County seeking records created or maintained by the then-Chief Civil Deputy Prosecuting Attorney that “concern judicial records, either under the common law, *Nast v. Michels*, or Washington State Court Rule GR 31.1.” Clerk’s Papers (CP) at 263-64. The relevant Public Records Officer acknowledged receipt of the request, sought and received clarification, gave a time estimate, and ultimately started providing records to Mr. Cortland. CP at 15-25; *id.* at 99, 117-121.

To do so, she started looking where records might be found: her first step was to ask the employee named in the request. CP at 224-26, 278, 280-82. He directed her to records related to the Lewis County Superior Court’s administration of the county law library, which he had been given by the Superior Court administrator when

interacting with Mr. Cortland about a previous records request on that court's behalf. *Id.*

Based on the text of the request and the responsive records' connection to a court, Lewis County produced its first three installments of records to Mr. Cortland under GR 31.1. *Id.* at 24-33, 221, 264-66, 278. Its process for doing this was essentially identical to PRA process but under a different legal theory, even to the point of citing the PRA in some of the correspondence. *Id.* at 20-30; *id.* at 224, 280 (testifying that there was "no practical difference in [the PRO's] work in searching for and providing records under GR 31.1 vs. under the" PRA—"her search and response were of the same type, quality, and extent").

In the meantime, Mr. Cortland and Lewis County were in litigation concerning the law library board, resulting in the production of many more records "concerning" judicial records. CP at 226, 282. Around the time of the third installment, two other requestors submitted identical requests to Mr. Cortland's; by then there were many more records, and they were county records under the PRA, not court records under GR 31.1. *Id.* Lewis County resolved to answer the new requests under the PRA; to treat Mr. Cortland's request equally by continuing to answer it under the PRA, too; and

to provide Mr. Cortland with a free copy of the records for the identical later requests. *Id.* The PRO set about searching for and amassing 3600 documents related to the law library litigation, which essentially entailed all documents related to the law library. *Id.* She enlisted the help of the Superior Court administrator, who detailed the search in a declaration submitted to the trial court. *Id.* at 226, 231-33, 282.

In August 2017, Lewis County sent these documents to Mr. Cortland with an explanation. CP at 36-37; 226, 282. It estimated communicating about the next installment's availability in October 2017. CP at 36-37. On Oct. 12, 2017, Lewis County sent Mr. Cortland an email concerning the likely costs of future documents on this request, with an estimate for when she would provide him the costs of the next installment. CP at 99-100, 111.

The next day, Mr. Cortland served this lawsuit on Lewis County, *id.* at 98, incorrectly indicating that he had stopped hearing from Lewis County, *id.* at 10. (He filed later. *Id.* at 1.)

Lewis County continued to search for and amass records for Mr. Cortland on this request and sent him a cost estimate for them. CP at 100, 108-09, 226-27, 282-83. Mr. Cortland and the PRO exchanged emails, but he did not claim the records. *Id.* After warning

him that failure to do so would abandon the request, Lewis County closed the request as abandoned some 30 days later. *Id.* at 227, 283. This ended Lewis County's search for responsive records. *Id.*

Mr. Cortland's lawsuit was predicated on the idea that Lewis County had claimed an exemption and denied access to the requested records by initially producing the documents under GR 31.1 instead of the PRA. See CP at 179-82 (arguing that tack); 212 n.2 (quoting a stipulation that this was the alleged violation). It alleged *no* search under the PRA occurred. *Id.* at 151. The thrust of Plaintiff's inadequate search argument was that the GR 31.1 search, particularly the Superior Court Administrator's involvement in it, was under GR 31.1 and therefore inadequate under the PRA. *Id.* at 182-83, 186-88 (arguing that a court could not give the PRA response or do the search). Lewis County defended on the idea that its ongoing production of records under any theory (explicitly under the PRA by the time of suit) made the suit premature under *Hobbs*. CP at 210-16. Lewis County proffered uncontested evidence of the search ongoing at the time of the suit and its end when Mr. Cortland abandoned the request, arguing that the legal theory of the search was irrelevant. *Id.* 225-27; 231-33; 281-83.

The trial court did not rule on any of these issues. It instead ruled that, notwithstanding the ongoing response at the time of suit, Lewis County's search evidence was in the wrong form and that it failed to prove its search's adequacy:

Lewis County clearly provided a large number of records. Lewis County was continuing to provide records. I don't find that there had been a stoppage of the flow of records, but the difficulty is, and I think Mr. Thomas has made this point, it's difficult for the plaintiffs to know what Lewis County is doing. It makes it difficult for the plaintiffs to know what was searched, where it was searched, what is being provided, what isn't being provided, whether the disclosure of records is being exempted. Lewis County is simply providing records, but without any way for a plaintiff to know all these things that a requestor's entitled to know.

Verbatim Report of Proceedings (VRP) (June 1, 2018) at 4-5.<sup>1</sup>

The written order incorporated this conclusion that Lewis County had to prove the adequacy of the search to the requestor as it was ongoing: "Lewis County's cobbled together attempt to demonstrate the adequacy of the search made it impossible for Plaintiff to determine what records he would receive or not receive under the [PRA]. This is a denial . . ." CP at 268. The trial judge also found no "affidavit or declaration detailing the search" in the record and held Lewis County not to have carried its burden to prove

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<sup>1</sup> There was no live evidence presented. See CP at 263 (reflecting only the filed materials and oral argument, not testimony, as the basis for the decision).

an adequate search. CP at 266-67 (Finding 8 and Conclusions 13-14). He declined to make Lewis County's requested findings that it had continued to provide records without stoppage, up to and including the day before the lawsuit was filed and thereafter until Mr. Cortland abandoned the request. *Compare* CP at 260-61 (requesting such findings) *with id.* at 263-66 (not making them). The trial court also ordered Lewis County to redo the search for records, without explanation of how the request's abandonment affected the scope of what should be searched. *Compare id.* at 260 *with id.* at 268-69.

Lewis County moved for reconsideration on grounds that the trial court's rulings were inconsistent: its finding that Lewis County was continuing to produce records without stoppage precluded its holding that Lewis County owed a duty to prove the search's adequacy to the requestor, since that duty arises only when the search is complete. CP at 270-85, 301-13. Lewis County pointed out that its response was continuing not just until time of suit, but past that until Mr. Cortland abandoned the request—in which case he was not entitled to any more searching than had been done. *Id.* The Court denied these arguments without explanation. *Id.* at 300.

Having lost on the merits and being bound by the trial court's order, Lewis County performed the re-search and provided the documents to Mr. Cortland. CP at 270 n.1, 278, 322. It offered to stipulate to a penalties analysis to speed entry of a final judgment, wishing to preserve its right to appeal to claim that the merits order was erroneous. *Id.* at 348-49. Mr. Cortland disputed that such a procedure was lawful, which the parties discussed at length. *Id.* at 329-30, 337-44, 347. Lewis County noted its preservation of its right to appeal at the time of the final deal, *id.* at 329-30, which was an agreed motion and order reflecting that the parties disputed whether the stipulation affected any right to appeal. *Id.* at 315, 321-23. The stipulation also noted that it was predicated on the courts' merits order being binding. *Id.* at 317.

Both parties presented the stipulation to the trial judge. VRP (Nov. 16, 2018) at 4. When asked to comment, Lewis County specifically put on the record that it wished to preserve its right to appeal the merits ruling:

MR. EISENBERG: I think it's important for Lewis County to make one additional thing on the record. You'll see from the written documents the parties dispute what effect, if any, this proposed agreed order would have on either party's rights to appeal, and I just thought it was worth pointing out that there is a dispute over that. There isn't any specific agreement on that. Thank you.

*Id.* at 5. Lewis County continued:

[I]n candor to the court, Lewis County wishes to preserve its right to appeal potentially the underlying merits ruling and does not believe that stipulating to the penalty that follows from that merits ruling, while that ruling is binding on Lewis County because this court made it, would waive its right to appeal the underlying merits ruling. And so it wished to reflect that the parties don't have any agreement on that in the order to avoid waiver.

*Id.* at 6. Mr. Cortland's attorney disagreed, asserting that the stipulation necessarily waived any right to appeal. *Id.* The Court, having understood the dispute and its reflection in the written order, signed the document with the parties' agreement. *Id.* at 6-7.

Lewis County timely appealed. CP at 353-54. Mr. Cortland moved to dismiss the appeal as frivolous and for the purposes of delay. Motion to Dismiss, No. 52739-1-II (Feb. 22, 2019). Lewis County cited the record above and analogized to a stipulated facts bench trial. Appellant's Response to Motion to Dismiss, No. 52739-1-II (March 18, 2019). The Commissioner denied the motion to dismiss. Letter of March 20, 2019, No. 52739-1-II.

## V. ARGUMENT

### A. Lewis County Did Not Violate the Public Records Act.

#### 1. *Standard of Review*

Public Records Act decisions based on documentary evidence are not reviewed in the same manner as other determinations:

Public agency actions challenged under the PRA are reviewed de novo. An appellate court stands in the same position as the trial court when the record consists entirely of documentary evidence and affidavits. The reviewing court is not bound by the trial court's factual findings.

*Cornu-Labat v. Hosp. Dist. No. 2 of Grant Cty.*, 177 Wn.2d 221, 229, 298 P.3d 741 (2013) (citations omitted). So, this Court has leeway to consider the evidence with regard to findings made or not made when determining the issues. Legal issues are reviewed de novo, as normal. *E.g., John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016).

2. *Mr. Cortland has no cause of action under the PRA because there was no denial of access: Lewis County's response was ongoing at the time of suit and continued until he abandoned the request.*

Mr. Cortland filed this lawsuit one day after Lewis County sent him an update concerning its progress in responding to his request. CP at 10, 98-100, 111. It had already given him multiple installments, the most recent of which had included about 3600 records. CP at

24-33, 36-37; 221, 226, 264-66, 278, 282. And it continued to offer him records afterwards, which he declined to claim. CP at 100, 108-09, 226-27, 282-83. Even the trial court conceded, when ruling against Lewis County, that Lewis County had continued to provide records to Mr. Cortland with no stoppage. VRP (June 1, 2018) at 4-5. These facts make clear that Lewis County had not taken final agency action on the request—meaning that Mr. Cortland had no cause of action under the PRA. This is especially true in light of Mr. Cortland’s abandonment of the request during the lawsuit. The Court should reverse the trial court’s ruling and direct that judgment enter for Lewis County.

The Public Records Act is a strongly worded mandate for public disclosure, whose purpose is to encourage the production of records so that the public is informed about government. RCW 42.56.030; *Sanders v. State*, 169 Wn.2d 827, 849-50, 240 P.3d 120 (2010). This intent does not make all agency responses grounds for redress in court, however. Denial of the right to inspect or copy is a prerequisite to a PRA cause of action:

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).

Particularly when the production of records is ongoing, the production of records is not “final action” allowing for suit. *See Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 936, 335 P.3d 1004 (2014) (citing RCW 42.56.520's provision that denial of inspection is “final action . . . for the purposes of judicial review”). Rather, “a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.” *Id.* Indeed, “[a] requestor is not permitted to initiate a lawsuit prior to an agency's denial of a public record. . . . When an agency produces records in installments, the agency does not ‘deny’ access to the records until it finishes producing all responsive documents.” *John Doe v. Benton Cty.*, 200 Wn. App. 781, 788-89, 403 P.3d 861 (2017); accord *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 651-52, 334 P.3d 94 (2014) (noting that no denial occurs even if the agency's installment is slightly later than estimated); *Rufin v. City of Seattle*, 199 Wn. App. 348, 357-58, 398 P.3d 1237 (2017) (same).

These holdings mirror the language of the PRA, which grants costs and attorney fees to a plaintiff who prevails on “the right to inspect or copy any public record” and grants penalties for “each day that he or she was denied the right to inspect or copy said public record.” RCW 42.56.550(4). Nowhere does it mention costs, attorney fees, or penalties for a requestor who receives or is receiving a copy of the public records responsive to the request. Because Mr. Cortland sued while Lewis County’s response was still ongoing, he had no cause of action, and this Court should reverse.

The fact Lewis County initially produced records under GR 31.1 instead of the PRA does not alter that its response was ongoing. The PRA permits an agency to satisfy a PRA request by “providing the record.” RCW 42.56.520(1)(a). It does not require any specific explanation accompanying the record, nor does it require a statement indicating that the record is produced under the PRA. 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) (holding

“the express requirement for an explanation” of denials and “the absence of such a requirement” for other options under the statute to be “a conscious decision by the legislature”). In *Ockerman*, an agency incorrectly asserted that a requestor was not entitled to a PRA response, but agreed to satisfy the PRA request anyway and gave a time estimate. *Id.* at 214-15. The requestor sued, demanding an explanation of the time estimate. The Court of Appeals held that no explanation was required: the plain language of the statute required an explanation only for a *denial* of the request. *Id.* at 216-17. It did not matter that the agency’s statements to the requestor were legally wrong. See *id.* at 220 (declining to address this issue as unnecessary); see also *O’Connor v. Dep’t of Soc. & Health Servs.*, 143 Wn.2d 895, 910, 25 P.3d 426 (2001) (showing that the agency’s proffered rationale in *Ockerman* was legally wrong). So, Lewis County’s continuing provision of records, not the accompanying explanation, is what the PRA recognizes as an ongoing response.

This outcome serves the PRA’s intent to encourage an agency to furnish records, even if the agency quibbles with the requestor’s entitlement to the records under the PRA. 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 without the right magic words does not further the statutory intent. *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 production of records).

Besides, Lewis County informed Mr. Cortland while the response was ongoing that it would be providing him documents under the PRA, alleviating any concern that its GR 31.1 process was distinct. CP at 36-37; 226, 282; *see also id.* at 20-30, 224, 280 (showing that the process was essentially the same, even citing the PRA in ostensible GR 31.1 correspondence). This would have cured any defect in the ongoing response, if there were one. *Hobbs*, 183 Wn. App. at 939-41. Because Lewis County was producing records to Mr. Cortland in response to his request, it was satisfying its PRA obligations regardless of the words used.<sup>2</sup> And because that response was ongoing, no PRA cause of action had yet accrued.

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<sup>2</sup> Lewis County already prevailed against Mr. Cortland on this same issue, i.e., that providing records under GR 31.1 satisfies the PRA's records-production requirement. See CP at 304-05, 310-13 (arguing preclusion based on *Cortland v. Lewis County*, Thurston County Cause No. 17-2-04278-34). Although Mr. Cortland appealed that ruling (Cause No. 52066-4-II), Mr. Cortland is precluded from arguing that Lewis County's GR 31.1 response did not "count" under the PRA. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262-64, 956 P.2d 312 (1998).

Under the force of *Hobbs* and *John Doe v. Benton Cty*, this Court should reverse.

Compounding this reasoning is the fact that Mr. Cortland abandoned his request while Lewis County was still responding. CP at 227, 283. “If an installment of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request.” RCW 42.56.120(4); accord WAC 44-14-04005(1) (2nd paragraph). So, Mr. Cortland had no cause of action at the time of his lawsuit, and he abandoned any claim he had to continued work on the request shortly after it was filed. Under these circumstances, the trial court was doubly mistaken. This Court should reverse and direct that judgment enter for Lewis County.

3. *The PRA does not require an agency to prove the adequacy of its search to the requestor while the search is still ongoing.*

The principle above (that no PRA cause of action accrues until final agency action denying access to records) applies with equal force to a claim of denial via inadequate search. An inadequate search is a denial of an adequate response. *Neigh. All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011); *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 750, 174 P.3d 60, 78 (2007). But, this is predicated on an inadequate search precluding

inadequate production. *Neigh. All.*, 172 Wn.2d at 721. That is why *Neighborhood Alliance* directs that “an adequate response to the initial PRA request *where records are not disclosed* should explain, at least in general terms, the places searched.” *Id.* at 722 (emphasis added). In contrast, the Court did not think its rule would apply with any force to “a typical case” where records are “readily available.” *Id.* In that typical case, the production of records itself would indicate the ongoing search—and while that production is ongoing, the scope of the agency’s search and response is not yet determined. See RCW 42.56.080(2) (allowing agencies to respond “on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure”); RCW 42.56.520(2) (“Additional time required to respond to a request may be based upon the need . . . to locate and assemble the information requested.”). Simply put, an agency is allowed to keep searching for records while it is producing them, and a challenge to an unfinished search’s scope is premature.

This point is implicitly reinforced by the analysis of the “final agency action” cases. In *Hobbs*, the search was ongoing during the installment-based response even after the requestor sued, and it was the search’s final scope, after the final installment, that was its

measure. *Hobbs*, 183 Wn. App. at 932, 945. *John Doe* built upon this reasoning further. It defined final agency action to occur only when the agency finishes producing installments of responsive records, noting that installment-based responses occur while the agency “assembles a larger set of requested records.” *John Doe*, 200 Wn. App. at 788-89. “Assembling” goes hand-in-hand with searching: records must be “locate[d] and assemble[d].” RCW 42.56.520(2). So, by allowing suit only after final action, *John Doe* implicitly allows suit only after the search is complete.

The trial court was disturbed by the idea that Lewis County was “simply providing records” without proving the adequacy of its search to the requestors while it proceeded. VRP (June 1, 2018) at 4-5; CP at 268 (Conclusion 15).<sup>3</sup> But, *Neighborhood Alliance* directs an agency to inform the requestor about the search at the time of final agency action, when no records are disclosed. 172 Wn.2d at 722. The Attorney General’s revised model rules agree: they discuss

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<sup>3</sup> Beyond its express words, one can tell that the trial court found this lack of midstream explanation important from what it did *not* say: the trial court declined to include findings and conclusions about the rest of the progress of the request, including the undisputed fact that Lewis County produced 3600 records on this request after the events articulated in the merits order. Apparently, the continuing response and provision of records were not relevant to the trial court because Lewis County did not satisfy the request’s desire to know about the search while it was occurring. This is contrary to *Hobbs* and *John Doe*, which require a court to consider when final action occurs to determine whether a suit is timely.

explaining the scope of the search when no responsive documents are located at the end of the search. WAC 44-14-04003(10). The Supreme Court has affirmed this reading of the case:

Agencies must make a sincere and adequate search for records. RCW 42.56.100; *Neigh. All. Of Spokane County v. Spokane County*, 172 Wn.2d 702, 720, 723, 261 P.3d 119 (2011). When an agency denies a public records request on the grounds that no responsive records exist, its response should show at least some evidence that it sincerely attempted to be helpful. See, e.g., *Neigh. All.*, 172 Wn.2d at 722.

*Fisher Broad.—Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014). These authorities do not bear out the trial court's holding that Lewis County had a duty to prove the adequacy of its search while it was still producing records, before the search had finished. Rather, when production is ongoing, the agency has not yet taken final action, and no challenge to its response (including the adequacy of the search) yet lies. *John Doe*, 200 Wn. App. at 789; *Hobbs*, 183 Wn. App. at 936.

This rule makes sense: if a requestor sues about the adequacy of the search before it is finished, it deprives the agency of a chance to increase the scope of its search to include all relevant documents before it is done responding. See *Hobbs*, 183 Wn. App. at 939-41 (encouraging agencies to satisfy any concerns the requestor may have while the agency's response is ongoing).

Accordingly, Mr. Cortland did not yet have a cause of action for an inadequate search at the time he sued.

Nor did he acquire one. Lewis County continued to offer records to Mr. Cortland after the lawsuit was filed and he declined to claim them. CP at 100, 108-09, 226-27, 282-83. Because Mr. Cortland abandoned the request, Lewis County stopped searching for and providing further records, *id.* at 227, 283, which is expressly permitted under the Act, RCW 42.56.120(4); WAC 44-14-04005(1). So, Mr. Cortland not only sued before his cause of action accrued, he abandoned any further entitlement to searching before his cause of action accrued. This Court should reverse the trial court and direct that judgment be entered for Lewis County.

*4. Lewis County's evidence proved an adequate search up to the point that Mr. Cortland abandoned the request.*

Even if Mr. Cortland's abandonment of his request resulted in a final action permitting the suit to go forward, Lewis County's evidence established an adequate search. An agency bears the burden of showing that its search was adequate, to wit, "reasonably calculated to uncover all relevant documents." *Neigh. All.*, 172 Wn.2d at 720. Because an agency need not continue fulfilling a request if an installment is not claimed, RCW 42.56.120(4), Lewis County needed only to demonstrate that its search was reasonably

calculated to find relevant documents—finding *all* relevant documents was something it was relieved of doing when Mr. Cortland abandoned the request. CP at 258, 260 (arguing this point).

Lewis County produced evidence that its PRO consulted with the attorney named in the request to think about possible locations of documents. CP at 224-26, 278, 280-82. She obtained such documents and began reviewing and producing them. *Id.* at 226, 282. Later, she expanded the search to include essentially anything related to the law library, which included more than 3600 records. *Id.* She enlisted the help of the Lewis County Superior Court's Public Records Officer, who was in control of the bulk of the records related the law library, and whose search was attested to in detail. *Id.* at 231-33. Lewis County's witnesses testified that they were looking in places in which they thought they might find responsive records. *Id.* at 227-28, 233, 283-84. The PRO further testified that she continued to locate records for Mr. Cortland and "was prepared to deliver any further responsive records to Mr. Cortland under the PRA" until he "abandoned the request." *Id.* at 227-28, 283-84. His abandoning it "ended any further searching or production of records she would have done." *Id.*

Mr. Cortland provided no evidence to the contrary. Rather, his claim was that the PRA search did not count because it was under GR 31.1 instead of the PRA or because the Superior Court Administrator did some of it. CP at 151, 182-83, 186-88. So in actual fact, there was no dispute that a search had occurred by somebody in the manner attested to—only its significance was contested. And on that point, Mr. Cortland lost in a separate case holding that a response producing records under GR 31.1 was sufficient to satisfy the PRA. See CP at 304-05, 310-13; see *also* footnote 2, above. As well he should, given the evidence that the PRO did searches no differently under GR 31.1 than the PRA, CP at 224, 280, and the legal authority that an agency need not identify the precise legal theory by which it locates and produces records, RCW 42.56.520(1)(a), (4), *Ockerman*, 102 Wn. App. at 217.

The evidence therefore showed that Lewis County had produced some 4000 records to Mr. Cortland in response to this request through an ongoing search, which continued up until and after the time of suit until he abandoned the request. Whether this request uncovered all of the relevant documents is not really at issue because Mr. Cortland abandoned the request before it was done.

There was no good reason to find that this evidence failed to demonstrate an adequate search.

The trial court's decision that the evidence was inadequate was predicated on two erroneous conclusions. The first is that Lewis County had to demonstrate the adequacy of the search to the requestors during the request before the lawsuit—which is contrary to the law as discussed above. The second was that the trial court did not believe Lewis County could rely on verified interrogatories to establish the adequacy of the search. See CP at 266 (noting the absence of a declaration or affidavit). This reasoning is faulty: verified statements have long been allowed to substitute for affidavits. *State ex rel. Adams v. Irwin*, 74 Wash. 589, 591-92, 134 P. 484 (1913); *accord Eugster v. City of Spokane*, 118 Wn. App. 383, 414-15, 76 P.3d 741 (2003); *see also* RCW 9A.72.085 (allowing verified statements to substitute for affidavits). The trial court overlooked that one of Lewis County's witnesses supplied a formal declaration, CP at 231-33. And after Lewis County cured any deficiency in this regard by having the witness formally re-attest to the same material, the trial court failed to reconsider. CP at 278-85, 300. Really, what motivated the trial court was the incorrect belief that Lewis County had not demonstrated the adequacy of the search

to the requestor during the ongoing request. Because this motivation was incorrect on the law, the Court should reverse.

*5. The Court should reverse the decision below.*

In conclusion, Lewis County did not violate the PRA. It began searching for and producing records to Mr. Cortland in response to his request. The search was ongoing and fruitful, having yielded about 4000 records, when Lewis County sent Mr. Cortland an update on its progress. He sued the next day, when the response was not finished. Lewis County continued to search for records and offered them to Mr. Cortland, who declined to accept them and therefore abandoned the request. Because Lewis County was in the midst of a search adequate to seek relevant records, no final action had occurred, and that Mr. Cortland had no cause of action when he sued. He then abandoned the request before any cause of action could have accrued. The trial court erred in concluding that Lewis County failed to prove an adequate search on these facts, when no such cause of action yet accrued. Even if it had, Lewis County's uncontroverted evidence established an adequate search, which did not have to be fully fledged because Mr. Cortland abandoned the request. This Court should reverse and direct the entry of judgment for Lewis County.

**B. No Penalties, Costs, or Attorney Fees Follow if An Agency Complies with the PRA.**

If the Court reverses because Lewis County did not violate the PRA, it must also reverse the trial court's orders awarding penalties, costs, and attorney fees. Mr. Cortland received penalties, costs, and attorney fees below because he prevailed on a claim regarding his right to access records. RCW 42.56.550(4); CP at 268, 322-23, 365-68. In the absence of this victory, no such awards are appropriate. *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 707, 310 P.3d 1252 (2013) (declining an award when the requestor did not prevail); *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 387, 374 P.3d 63 (2016) (denying an award when the agency's action was lawful). Therefore, because Lewis County did not violate the PRA, this Court should reverse not only the merits order but the subsequent orders as well.

**C. Lewis County Preserved its Right to Appeal.**

Mr. Cortland already challenged Lewis County's right to appeal any of the orders in this matter, and will likely do so again in his response brief. The Commissioner was not persuaded; the Court should not be persuaded either. Lewis County explicitly preserved its right to appeal at all points related to its stipulation to a penalties analysis in this matter. The Court should treat its stipulation in the

manner of a stipulated facts bench trial permitting appeal as opposed to a settlement precluding it.

Mr. Cortland's argument is based on *Wash. Asphalt Co. v. Harold Kaeser Co.*, 51 Wn.2d 89, 91, 316 P.2d 126 (1957), which dismisses an appeal taken by a party from a stipulated judgment. But even under that case's analysis, Lewis County's appeal may proceed: it directs that a stipulated judgment be construed as a contract between the parties. *Id.* A contract is interpreted in light of the parties' intent, including objective manifestations of intent in the context of the agreement. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). There are several objective manifestations in the record that Lewis County, being bound by ruling of the trial court that it had violated the PRA, offered to stipulate to a PRA penalties analysis to speed the entry of a final judgment that it could appeal. Lewis County articulated this for the first time as follows:

Lewis County proposes to stipulate to the penalty analysis above for purposes of speeding entry of a final order in this matter. This is not an offer of settlement, for Lewis County wishes to maintain its ability to claim that the judge's order on the merits was erroneous. It is instead a stipulation designed to speed you to a final judgment.

Clerk's Papers at 348-49; see also *id.* at 347 ("Lewis County stands

by its proposed stipulation to the final penalties order, preserving its right to claim that Judge Skinder's merits order was incorrect on the law."); *id.* at 337-44 (arguing about appeal); *id.* at 329-30 (reciting Lewis County's understanding that it stipulated without waiver of its right to appeal at the time the final deal was made).

The Agreed Motion and Order whereby the parties put the proposed stipulation before the Court indicated, "Please note that the parties dispute whether the attached stipulation affects any right to appeal this matter." CP at 315. The stipulation indicates that the merits ruling had entered and that, "that order presently being binding, both parties stipulate to the following statutory penalty." *Id.* at 317. And the proposed order notes that the parties disputed whether the stipulation affects any right to appeal. *Id.* at 321. All of this language refers to the fact that Lewis County consistently asserted its right to appeal during its negotiation of the stipulation.

Both parties presented the stipulation to the trial judge. VRP (Nov. 16, 2018) at 4. When asked to comment, Lewis County specifically put on the record that it wished to preserve its right to appeal the merits ruling:

MR. EISENBERG: I think it's important for Lewis County to make one additional thing on the record. You'll see from the written documents the parties dispute what effect, if any, this proposed agreed order

would have on either party's rights to appeal, and I just thought it was worth pointing out that there is a dispute over that. There isn't any specific agreement on that. Thank you.

*Id.* at 5. Lewis County continued:

[I]n candor to the court, Lewis County wishes to preserve its right to appeal potentially the underlying merits ruling and does not believe that stipulating to the penalty that follows from that merits ruling, while that ruling is binding on Lewis County because this court made it, would waive its right to appeal the underlying merits ruling. And so it wished to reflect that the parties don't have any agreement on that in the order to avoid waiver.

*Id.* at 6. Mr. Cortland's attorney disagreed, asserting that the stipulation necessarily waived any right to appeal. *Id.* The Court, having understood the dispute and its reflection in the written order, signed the document with the parties' agreement. *Id.* at 6-7.

Thus, there are several objective manifestations of intent in the record that Lewis County wished to stipulate to a penalty that followed from the Court's prior, binding order, preserving its right to appeal and argue that the prior order was erroneous. The point of the stipulation was to get to a final judgment, to facilitate appeal.

Such an approach is not uncommon. A criminal defendant who loses a pretrial motion may stipulate to the admissibility and sufficiency of facts under the terms of the order he or she believes is incorrect; he or she is then convicted and sentenced, and can appeal

the conviction and underlying order. See, e.g., *State v. Brown*, 166 Wn. App. 99, 101-02, 269 P.3d 359 (2012), *State v. McCarty*, 152 Wn. App. 351, 356-58, 215 P.3d 1036 (2009); *State v. Bale*, No. 44709-6-II, 2015 Wash. App. LEXIS 3, at \*12 (Ct. App. Jan. 6, 2015) (unpublished opinion). Lewis County even discussed this practice during the negotiations, showing its intent to pursue this type of outcome. CP at 338.

Moreover, such an approach is sensible in PRA cases. A penalties analysis follows necessarily from a finding of a PRA violation. *Neigh. All.*, 172 Wn.2d at 726. An agency who has violated a requestor's right to inspect or copy records must pay attorney fees for litigation. RCW 42.56.550(4). Having been found in violation of the PRA, an agency should not have to litigate penalties unnecessarily, incurring the other side's attorney fees, to reach a final judgment from which an appeal may be taken.

None of the three cases Mr. Cortland cited before involving stipulated judgments have a record like the one herein, in which it is clear that a party is attempting to preserve its right to appeal a prior order. In *Wash. Asphalt Co.*, the record was devoid of any mention of disputed issues leading to the stipulation—the record reflected only that the stipulation occurred in open court, was reasonable, and

was approved. 51 Wn.2d at 90-91. In the next case, the defendant stipulated to judgment without raising any defenses or counterclaims, and only raised them in a later answer and attempt to vacate the prior judgment. *Winton Motor Carriage Co. v. Blomberg*, 84 Wash. 451, 453-55 & 457-58, 147 P. 21 (1915). The same is true in the third case: the defendant affirmatively consented to the judgment without noting any reservations or grounds for appeal. *Calibrate Prop. Mgmt., LLC v. Nhye*, 2016 Wash. App. LEXIS 2686, at \*2-4 (Ct. App. Nov. 7, 2016) (unpublished). Certainly, if a party makes no record to preserve its appeal, then settlement waives such claims. But a different result follows when a record is made of a stipulation for purposes of facilitating an appeal, as shown by the “stipulated facts bench trial” cases cited above. In keeping with both the Civil Rules’ and RAPs’ preference for deciding cases on their merits, this Court should consider the merits of Lewis County’s appeal rather than finding it barred by any technical defect in the form of the stipulation. RAP 1.2(a); *Vaughn v. Chung*, 119 Wn.2d 273, 280, 830 P.2d 668 (1992).

Another way of putting this is to say that a stipulated judgment only precludes claims or controversies “within the scope of the judgment.” *Wash. Asphalt Co.*, 51 Wn.2d at 91. The record here

shows that the judgment's scope did not encompass preclusion of an appeal of the merits ruling: the terms of the agreed motion called out the dispute about the appeal; the agreed order noted the dispute; and the trial court entered the order only after hearing a record of the dispute amongst the parties on this point. CP at 315, 321; VRP (Nov. 16, 2018) at 5-6. Thus, the stipulated judgment did not include in its scope a resolution of Lewis County's right to appeal. Lewis County should be able to argue its case.

For the same reasons, this case is not moot or lacking justiciability—as Mr. Cortland also argued. Lewis County seeks to overturn the Court's merits ruling, on which the penalties order and attorney fee order were predicated. If the Court agrees with Lewis County, it may afford material relief by eliminating two money judgments.

Nor did Lewis County's stipulation to the penalties analysis render any appeal meaningless: the stipulation was based on the trial court's erroneous merits ruling that Lewis County violated the PRA. See CP at 317 (noting that the stipulation follows from the merits order, which was then binding). Lewis County had argued in opposition to such a ruling, but once made, Lewis County was bound by it as law of the case. Stipulating to an analysis consistent with

that ruling, while making a record of intent to appeal to avoid waiver, is just good-faith practice to reduce litigation—Lewis County did not have to take exception or otherwise point out its objection to the Court each time the ruling came up.<sup>4</sup> See CR 46 (eliminating the need to take exception after one's has objected to the initial ruling). Consistent with its stipulation to the penalties analysis and representations below, Lewis County assigns error to the penalties and attorney-fee orders solely based on their derivation from the erroneous merits orders. CP at 353. The Court should consider the propriety of those merits orders and then rule accordingly.

Because the merits order and order denying reconsideration were in error, the Court should reverse them and the subsequent orders predicated on them, directing that judgment be entered for Lewis County.

## **VI. CONCLUSION**

Mr. Cortland sued prematurely. Lewis County's response to his request was ongoing up to the time of suit (including an email the day before he sued) and afterwards. Because the response was ongoing, there was no final action denying Mr. Cortland access to

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<sup>4</sup> Although, in fact, Lewis County did note its desire to appeal the merits ruling as erroneous at the time of entry of the stipulated penalties order.

records. No cause of action had yet accrued for denial of access or inadequate search: the search was still ongoing. After the suit, Mr. Cortland abandoned the request and any entitlement to further searching related to it. Because Lewis County searched for and provided records in an ongoing manner through the time of suit until Mr. Cortland abandoned the request, Lewis County did not violate the PRA. The trial judge was wrong to discount Lewis County's evidence and to impose a duty to prove the adequacy of the search to the requestor while the response is ongoing. Lewis County preserved its right to appeal this erroneous ruling. The Court should reverse and direct entry of judgment for Lewis County.

RESPECTFULLY submitted this March 22, 2019.

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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, by agreement at his address of joe@joethomas.org.

Executed this March 22, 2019 in Chehalis, WA:

  
Eric Eisenberg

**LEWIS CTY PROSECUTING ATTY'S OFFICE**

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