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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

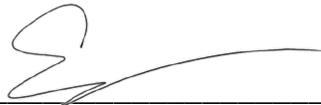
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**Appellant Lewis County's Reply Brief**

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## I. SUMMARY

Respondent's brief relies chiefly on procedural bars that are unsupported in the record. Contrary to Respondent's contention, Lewis County did not admit violating the PRA; it argued that it had not done so and sought reconsideration on that point. After the trial court erroneously ruled to the contrary, Lewis County stipulated to a PRA penalties analysis to speed entry of final judgment for appeal. Lewis County noted this intention multiple times, even pointing it out at the time of the stipulation's entry. Consequently, Mr. Cortland's aggrieved-party, waiver, and invited error arguments all fail: Lewis County is permitted to appeal the trial court's orders.

On the merits, Lewis County did not claim GR 31.1 as an "exemption" to the Public Records Act and met its burden to prove its search for records was adequate. The search evidence was undisputed; the only question was whether the search counted if initiated under GR 31.1. It did, and Mr. Cortland is precluded from disputing the point. Because Lewis County's search for and production of records to Mr. Cortland was ongoing when he sued and when he abandoned the request, Mr. Cortland had no cause of action for an improper search. The Court should reverse the trial court's incorrect orders and direct entry of judgment for Lewis County.

## II. FACTUAL CLARIFICATION

Mr. Cortland's recitation of the facts omits a year, skipping from June 2017 to August 2018 as if the latter were August 2017. Respondent's Brief (May 14, 2019) [Resp. Br.] at 5. The omitted facts consist of four key events: (1) Lewis County's ongoing production of records to Mr. Cortland, CP at 36-37, 112, 226, 282; (2) its explanation that the production was be under the PRA, *id.*; (3) its communication with him about providing further records one day before the lawsuit, *id.* at 99-100, 111; and (4) Mr. Cortland's abandonment of his request after the lawsuit was filed, *id.* at 100, 108-09, 226-27, 282-83. The Court should not overlook these facts even if Mr. Cortland's brief leaves them out.

## III. ARGUMENT

### **A. Lewis County Did Not Admit to Violating the Public Records Act and Preserved Its Right to Appeal.**

1. *Lewis County is aggrieved by the trial court's incorrect finding, over Lewis County's objection, of a PRA violation.*

Mr. Cortland argues that Lewis County is not an "aggrieved party" who may appeal the trial court's decision that Lewis County violated the PRA. Resp.'s Br. at 8-11. He is mistaken. The trial court ruled over Lewis County's objection and against its pecuniary interests. Lewis County is aggrieved and may appeal. RAP 3.1.

At the merits hearing below, Lewis County argued that it had not violated the PRA because its ongoing production of records made Mr. Cortland's lawsuit premature under the law. CP at 210-16. Lewis County offered uncontested evidence of the search ongoing at the time of the suit and afterwards, until Mr. Cortland abandoned the request. *Id.* 225-27; 231-33; 281-83. When the trial court found that Lewis County was producing records without stoppage, but had failed to prove the adequacy of its search, Lewis County sought reconsideration. CP at 270-85, 301-13. The adverse ruling resulted in Lewis County's obligation to pay costs, attorney fees, and penalties. CP at 267-68 (¶¶13-16); 322-23; *see also* RCW 42.56.550(4); *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 726, 261 P.3d 119 (2011). It placed Lewis County under pecuniary obligation over its objection, aggrieving Lewis County and permitting appeal. *Sheets v. Benevolent & Protective Ord. of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949).

Mr. Cortland misapplies *Randy Reynolds & Assocs. v. Harmon*, 193 Wn.2d 143, 150, 437 P.3d 677 (2019), to suggest the opposite. The appellant in that case had "prevailed on every issue raised below," and so fell within a well-worn rule that the prevailing party cannot appeal the favorable decision. *Id.* at 150-51 (citing a

case from 1915). Lewis County did not so prevail. Mr. Cortland's argument is misplaced; the Court should consider the matter on the merits and reverse the trial court.

2. *Lewis County neither waived its right to appeal nor invited error in the trial court.*

Really, Mr. Cortland's assertion is not that Lewis County fails to be aggrieved, but that Lewis County allegedly consented to the adverse ruling as a form of waiver or invited error. Both theories ignore the record: Lewis County stipulated to a PRA penalty analysis only once it was bound by the trial court's prior adverse ruling. Because Lewis County clearly manifested its intent to appeal when negotiating and entering the stipulation, the stipulation does not amount to waiver or invited error.

Mr. Cortland has abandoned his original theory that the stipulation waived appeal under *Wash. Asphalt Co. v. Harold Kaeser Co.*, 51 Wn.2d 89, 316 P.2d 126 (1957). *Compare* Resp. Br. at 11-19 (failing to cite the case or its progeny) *with* Respondent's Motion to Dismiss Appeal (Feb. 22, 2019) at 5-9 (relying on this case). This makes sense because the case cuts in Lewis County's favor. It interprets stipulations under contract theory, which, like waiver, turns on manifestations of intent. *Id.* at 91; *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). Lewis

County's Opening Brief details how Lewis County offered to stipulate to penalties to speed entry of judgment so that it could appeal. Lewis County's Opening Brief (March 22, 2019) at 27-30. The negotiations and entry of final judgment clearly evinced an intent *not* to waive appeal of the erroneous merits ruling. CP at 347-49, 337-44, 329-30, 315, 321; VRP (Nov. 16, 2018) at 4-6. Thus, under *Wash. Asphalt's* logic, the stipulation does not bar appeal.

Mr. Cortland shifts to citing cases in which defendants did not pursue procedural bars in a timely fashion. See *King v. Snohomish Cty.*, 146 Wn.2d 420, 424-26, 47 P.3d 563 (2002) (considering a tort-filing defense waived when not pursued for four years); *Romjue v. Fairchild*, 60 Wn. App. 278, 281-82, 803 P.2d 57 (1991) (considering a defective-service defense waived when obscured and not pursued until the statute of limitations ran). These cases bear no resemblance to the facts here: throughout the case, Lewis County argued that it had not violated the PRA for reasons substantially similar to those it raises now. CP at 48-58; 210-216, 225-27, 231-33, 260-61, 270-85, 301-13. Nothing about this behavior lulled Mr. Cortland into a sense that Lewis County waived its arguments.

Ultimately, Mr. Cortland simply believes that one cannot stipulate to results following from an adverse ruling without agreeing

with that ruling, even if expressly preserving the right to appeal on the record. This premise is false under two lines of cases.

The first line of cases permits stipulated facts bench trials, in which a criminal defendant who loses a pretrial motion can stipulate to the consequences of that ruling (the admissibility of certain evidence and/or its factual sufficiency for guilt) and still appeal the adverse ruling. 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). These cases embody the principle that one can submit to an adverse ruling without waiving appeal if one makes a record of that intent.

The second line of cases permits appeals by a party who lost a pretrial motion in limine to exclude evidence even if the party pulls the sting by introducing the evidence himself. See, e.g., *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 430, 814 P.2d 687 (1991), *rev. denied*, 118 Wn.2d 1011 (1992) (“[A] party prejudiced by an evidentiary ruling who then introduces the adverse evidence in an effort to mitigate its prejudicial effect is not precluded from obtaining review of the ruling.”); *accord State v. Justesen*, 121 Wn. App. 83, 93, 86 P.3d 1259 (Div. I, 2004); *Erickson v. Robert F. Kerr, M.D.*, 69

Wn. App. 891, 900, 851 P.2d 703 (Div. I, 1993), *partially rev'd on other grounds*, 125 Wn.2d 183 (1994); *Garcia v. Providence Medical Center*, 60 Wn. App. 635, 641, 806 P.2d 766 (Div. 1, 1991). In these cases, the party is bound by the trial court's prior ruling and is permitted to act accordingly—even strategically—in litigating the rest of the case before appealing. Taking action consistent with the court's prior rulings does not operate as a waiver of the lost battle to exclude the evidence. *Justesen*, 121 Wn. App. at 93.<sup>1</sup>

Similarly here, Lewis County fought and lost on the issue of PRA liability before the trial court. Being bound by that ruling, it was permitted to stipulate to the ruling's consequences while preserving its right to claim the ruling was wrong on appeal. See CP at 317 (noting that the stipulation followed from the merits order “presently being binding”); *id.* at 329-30 (asserting the right to appeal at the time of the final deal being made); VRP (Nov. 16, 2018) at 4-6 (preserving the right to appeal when the stipulation entered). Pronouncing intent to appeal on the record prevented waiver.

The same rationale applies in the invited error context. Invited error does not apply when a party, having lost a motion in limine to

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<sup>1</sup> “Waiver is the voluntary relinquishment of a right. ‘A defense lawyer who introduces preemptive testimony only after losing a battle to exclude it cannot be said to introduce the evidence voluntarily.’ *State v. Vy Thang*, 145 Wn.2d 630, 648, 41 P. 3d 1159 (2002).” *Id.*

exclude evidence, introduces the evidence itself to minimize prejudice from the adverse ruling. *State v. Whelchel*, 115 Wn.2d 708, 727-28, 801 P.2d 948 (1990); *State v. Watkins*, 61 Wn. App. 552, 558-59, 811 P.2d 953 (1991). This result fits into the doctrine's distinction between errors induced by the appellant, which preclude review, and errors of another to which the appellant merely submits, which do not preclude review. *Compare, e.g., In re PRP of Serano Salinas*, 189 Wn.2d 747, 757-58, 408 P.3d 344 (2018) (holding that defense counsel's drafting of a questionnaire and advocacy for private questioning was enough to invite open-courts error and preclude appeal) *with In re PRP of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014) (lead opinion) (opining that "merely assenting" to the other party or trial court's open-courts error did not preclude appeal) *and id.* at 125 (concurring opinion) (agreeing with the framework of causing vs. acquiescing to error but disagreeing on its application).

Here, Lewis County fought against the ruling that it violated the PRA. It merely submitted to the trial court's adverse ruling once made, which is not the same as inviting error. No exception or perpetual objection is required to preserve error. CR 46. Lewis County could stipulate to the legal consequences of the trial court's mistaken ruling to speed entry of a final order for appeal, without

waiving its right to appeal or inviting error. Lewis County's intent was clear on the record for Mr. Cortland and the trial judge—the Court should decide the merits of this case and reverse the ruling below.

3. *Lewis County stipulated to a penalties analysis only as a result of a binding court order, and so may appeal.*

In a final repackaging of his procedural arguments, Mr. Cortland asserts that Lewis County admitted PRA liability when stipulating to the PRA penalties analysis. Resp. Br. at 19-20. Once again, Lewis County fought against any finding of PRA liability. CP at 210-16; 225-27; 231-33; 270-85, 301-13. It stipulated only after it could not dissuade the trial court from making this mistake. See CP at 317 (noting that the stipulation followed from the merits order “presently being binding”). And throughout the negotiation and entry of this stipulation, Lewis County asserted its wish to appeal the trial court's error. *Id.* at 329-30; 337-44; 347-49; VRP (Nov. 16, 2018) at 4-6. So, as argued above, Lewis County may appeal to have this Court overturn the incorrect order. The Court should reverse.

**B. Lewis County Did Not Claim GR 31.1 as an Exemption to the PRA, and Mr. Cortland Is Precluded from Arguing to the Contrary.**

Mr. Cortland argues that Lewis County claimed GR 31.1 as an exemption to the PRA. Resp. Br. at 21-22. Lewis County did nothing of the sort: it initially *provided records* to Mr. Cortland under

GR 31.1 due to his request explicitly referencing that rule and appearing to seek judicial records. CP at 24-33, 221, 263-66, 278. While Lewis County's response was ongoing, it informed Mr. Cortland it would provide records under the PRA, which it continued to do until Mr. Cortland sued and thereafter until he abandoned the request. CP at 99-101, 112, 226-27, 282-83. At no point did Lewis County ever deny Mr. Cortland access to records or indicate that it would fail to produce the records to him; rather, it set about providing records in installments. As a result, Lewis County did not claim GR 31.1 as an "exemption." Mr. Cortland suffered no denial of access giving rise to a PRA cause of action.<sup>2</sup> He is also issue-precluded from arguing to the contrary.

Denial of the right to inspect or copy is a prerequisite to a PRA cause of action. RCW 42.56.550(1). Such a denial requires "final action" in which it "reasonably appears that an agency will not or will no longer provide responsive records." *Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 936, 335 P.3d 1004 (2014). "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

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<sup>2</sup> Mr. Cortland claims that Lewis County failed to raise this argument in its opening brief. Resp. Br. at 23-24. This claim is mystifying. See Lewis County's Opening Brief at 12-18. (arguing that Mr. Cortland suffered no denial of access).

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); *Rufin v. City of Seattle*, 199 Wn. App. 348, 357-58, 398 P.3d 1237 (2017). Lewis County was producing records in installments to Mr. Cortland when he sued—it had even communicated with Mr. Cortland one day before the suit was served. CP at 10, 98-100, 111. Because this is not final action denying access, Mr. Cortland had not yet accrued a cause of action. The Court should reverse.

The fact that Lewis County initially produced records under GR 31.1 instead of the PRA does not alter that its response was ongoing. First of all, Mr. Cortland is issue-precluded from arguing that production of records under GR 31.1 does not “count” to satisfy a PRA request. Lewis County already prevailed against Mr. Cortland on this exact issue, obtaining a final ruling on the merits 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); *Nielson v. Spanaway Gen. Med. Clinic*,

*Inc.*, 135 Wn.2d 255, 262-64, 956 P.2d 312 (1998). Although Mr. Cortland appealed that ruling (Cause No. 52066-4-II), a pending appeal does not suspend or negate the effect of issue preclusion. *Nielson*, 135 Wn.2d at 264. Thus, Mr. Cortland may not argue that Lewis County's production of records under GR 31.1 was an exemption as opposed to a production of records satisfying the PRA.

This would be true even if issue preclusion were not in play. 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.

Making the production of records matter, rather than magic words, serves the PRA's intent to encourage agencies to produce records even if they question the requestor's entitlement to them under the PRA. *See Sanders v. State*, 169 Wn.2d 827, 849-50, 240 P.3d 120 (2010) (deeming the intent of the PRA to be encouraging production of records); RCW 42.56.060 (shielding agencies from liability for producing records).

Besides, Lewis County informed Mr. Cortland while the response was ongoing that it would be provide 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 Lewis County proceeded identically under GR 31.1 and the PRA, 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 at the time of suit, Lewis County's response was ongoing regardless of the words used. No PRA cause of action had accrued.

Nor did one accrue after the suit was filed: Mr. Cortland abandoned the 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.

**C. Lewis County Met Its Burden of Proving Beyond a Material Doubt That Its Search for Records Was Adequate.**

*1. Standard of Review*

The Court should consider the evidence de novo to establish the facts. See CP at 263 (basing the decision solely on documentary evidence); *Cornu-Labat v. Hosp. Dist. No. 2 of Grant Cty.*, 177 Wn.2d 221, 229, 298 P.3d 741 (2013) (setting a de novo standard of review in such cases). This standard is especially appropriate here, when the trial court declined to make requested findings despite unrebutted evidence. Compare CP at 260-61 with *id.* at 263-66. Also, the trial court overlooked or discounted Lewis County's evidence. Compare CP at 266 (finding no "affidavit or declaration detailing the search") with CP at 231-33 (formally declaring how part of the search was performed) and CP at 98-101 (formally declaring how the search and response were ongoing at the time of suit) and CP at 223-229, 278-85 (verifying, and then formally declaring, how the search proceeded),. In short, the trial court missed the boat on the facts. This Court is free to right the ship.

2. *Lewis County proved its search's adequacy: the search was ongoing at the time Mr. Cortland sued and at the time he abandoned the request.*

Lewis County presented un rebutted evidence that its search for and production of records of over 4000 records was ongoing at the time Mr. Cortland sued and continued afterwards until Mr. Cortland abandoned the request. CP at 99-101, 108-09, 223-233, 278-85. This evidence suffices to prove an adequate search beyond a material doubt because no PRA cause of action for an inadequate search arises while the search is ongoing, and Mr. Cortland abandoned any right to further searching when he abandoned the request. The Court should reverse.

The PRA requires an agency to demonstrate an adequate search beyond a material doubt. *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011). This entails proof that the search was “reasonably calculated to uncover all relevant documents,” including places where records are reasonably likely to be found. *Id.* Importantly, however, “[w]hat will be considered reasonable will depend on the facts of each case.” *Id.*

Just as the PRA's mandate for disclosure does not make all agency responses grounds for a cause of action, its mandate to search adequately does not make all searches actionable. The

*Hobbs/John Doe* rule (that no PRA cause of action accrues until final agency action denying access to records) applies equally to causes of action predicated on inadequate searches: a claim of an inadequate search is a claim of an inadequate response, predicated on inadequate production of records. See *Neighborhood All.*, 172 Wn.2d at 721 (“The failure to perform an adequate search precludes an adequate response and production.”). When a search is ongoing, the search and production are not yet adequate or inadequate because their scope is not yet determined.

*Neighborhood Alliance* bears this out. It 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, so a challenge to an unfinished search’s scope is premature. See *Hobbs*, 183 Wn. App. at 936 (allowing suit only after “it reasonably appears that the agency will not or will no longer provide records,” which is not present when the requestor is on notice of an ongoing search and response); *John Doe*, 200 Wn. App. at 788-89 (allowing suit only after the agency finishes searching and providing installments of records).

Based on this standard, the trial court’s finding that Lewis County was providing records without stoppage was the critical one. VRP (June 1, 2018) at 4-5. This finding shows that Lewis County proved beyond a material doubt that its search was ongoing—meaning no cause of action had accrued. The evidence also demonstrated that Lewis County continued to look for and offer Mr. Cortland records until 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). On the specific facts of this

case, then, Lewis County’s search was demonstrably adequate: it was looking in reasonable places to find records—as shown by its production of relevant records, see *Neighborhood All.*, 172 Wn.2d at 722—up until the time it was permitted by law to stop searching.

The trial court mistakenly believed that an agency must demonstrate the adequacy of the search while it is ongoing. See VRP (June 1, 2018) at 4-5; CP at 268 (Conclusion 15). The judge reasoned that “simply providing records” without information about what is being searched and would be searched in the future deprived the requestors of information they were entitled to know. See *id.* 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; accord 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). Thus, Lewis County did not have 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.

Here, the evidence showed that Lewis County searched for and produced about 4000 records in installments, with search and response ongoing at time of suit and thereafter until Mr. Cortland abandoned request. CP at 99-101, 108-09, 223-233, 278-85. Lewis County's 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 related to the law library. *Id.* She enlisted the help of the Lewis County Superior Court's PRO, whose search was attested to in detail and resulted in 3600 documents. *Id.* at 226, 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. CP at 151, 182-83, 186-88. So in actual fact, there was no dispute that a search had occurred 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 *supra* (discussing preclusion). 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. Besides, Lewis County cured any such error by giving notice that it was responding under the PRA before Mr. Cortland sued. See *Hobbs*, 183 Wn. App. at 939-41. So, nothing about Mr. Cortland’s case undermined the impact of Lewis County’s evidence.

The trial court improperly rejected Lewis County’s evidence. CP at 266 (finding no “affidavit or declaration detailing the search”).

Lewis County's proof of the facts above was made via formal declarations and verified interrogatories. CP at 98-101, 223-33. The latter are an acceptable form of declaration. *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); GR 13. Even if not, Lewis County resubmitted the same documents incorporated into a formal declaration to cure any concern about their efficacy, and the trial court still discounted them. CP at 278-85, 300.

This Court should correct the trial court's mistake. Mr. Cortland's premature lawsuit and abandonment of his request make this case peculiar. Normally, an agency must demonstrate that it searched in all locations where documents could reasonably be found. But here, Mr. Cortland sued while the search was ongoing and abandoned the request before Lewis County finished. Lewis County can only be asked to demonstrate that it *was searching* in a manner reasonable to locate documents, since Mr. Cortland abandoned any right that Lewis County locate all of the responsive documents. Lewis County's evidence showed that. The Court should reverse and direct entry of judgment for Lewis County.

**D. The Court Should Award Mr. Cortland Neither Fees Nor Costs on Appeal.**

Because the Court should reverse, Mr. Cortland will not prevail and should receive neither fees nor costs on appeal. *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 707, 310 P.3d 1252 (2013); *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 387, 374 P.3d 63 (2016).

If Mr. Cortland were to prevail, the Court should award him only a portion of his costs and fees on appeal because much of his work was unproductive. See *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) (discounting from a reasonable fee “hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time”); accord *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 114 Wn.2d 677, 689, 790 P.2d 604 (1990); *O’Neill v. City of Shoreline*, 183 Wn. App. 15, 25, 332 P.3d 1099 (2014). Specifically, his attempts to scuttle this case on unsupported procedural grounds dwarfed the argument on the merits. Compare Cortland’s Motion to Dismiss (Feb. 22, 2019) (23 pages) and Cortland’s Motion to Modify (April 2, 2019) (6 pages) and Resp. Br. at 1-20 (20 pages arguing procedural bars) with Resp. Br. at 21-31 (11 pages arguing the merits). The Court should decline to award him any costs or fees associated with this unsuccessful work.

#### IV. CONCLUSION

The Court should decide this appeal on the merits. Lewis County was aggrieved by the trial court's ruling, which incorrectly subjected Lewis County to pecuniary obligation over its objection. Lewis County did not admit to PRA liability; it argued against it and sought reconsideration. Once bound by this ruling, Lewis County's stipulation to a PRA penalties analysis, explicitly preserving the right to appeal, was not waiver, invited error, or an admission the trial court's ruling was correct.

On the merits, Lewis County demonstrated that its search and production of records to Mr. Cortland was ongoing at the time Mr. Cortland sued, and continued afterwards until Mr. Cortland abandoned the request. Mr. Cortland suffered no denial of access, and no cause accrued before the suit. Nor did he acquire one based on because he abandoned any right to further searching or records when he abandoned the request. The Court should reverse and direct entry of judgment for Lewis County.

RESPECTFULLY submitted this June 13, 2019.

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Lewis County Prosecuting Attorney

by: \_\_\_\_\_

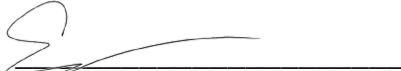
  
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DECLARATION OF SERVICE

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 June 13, 2019 in Chehalis, WA:

  
Eric Eisenberg

**LEWIS CTY PROSECUTING ATTY'S OFFICE**

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