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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**BRIAN GREEN,**

Appellant,

vs.

**LEWIS COUNTY,**

Respondent.

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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 Green appeals the trial court's decision to award him only some of the costs he sought below. He argues that the trial court failed to make an adequate record and that he was entitled to all of his costs as a prevailing Public Records Act plaintiff. The Court should reject these arguments. Mr. Green invited any error regarding an incomplete record, and in any event the record is adequate: it establishes that Mr. Green only partially prevailed below, so the trial court properly awarded him only some of his costs. The Court should affirm.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Appellant drafted the order from which he appeals, writing in the judge's ruling with no supporting reasoning based on the briefing or argument. Appellant declined to supply a transcript of the oral argument and oral ruling for this appeal. Has he invited any error concerning the adequacy of the record for appeal?
2. Appellant prevailed on the issue of whether Lewis County violated the PRA but lost on the penalty amount: the trial court adopted Lewis County's proposed penalty exactly. Did the trial court properly apportion Appellant's award only to issues on which he prevailed?
3. If this Court affirms the trial court, should it deny Appellant's request for attorney fees and costs on appeal?

## **III. STATEMENT OF THE CASE**

Brian Cortland and Brian Green jointly submitted two PRA requests to Lewis County in May of 2017. Clerk's Papers (CP) at

106. At the time, Lewis County had a half-time public records officer (PRO), who initially responded appropriately to the requests. *Id.* at 107. Later, she failed to meet her own time estimates for installments of responsive records, without an adequate explanation. *Id.*

This delay occurred during a period in which Mr. Cortland submitted more than 250 requests in six months to that PRO alone (as part of a nine-month period in which Mr. Cortland sent 600 requests to Lewis County as a whole). *Id.* The PRO had explained to Mr. Cortland that his large number of requests made it hard to estimate the time in which she could finish any one of them. But, she did not re-explain that point when contacting Mr. Cortland about the requests at issue here, nor did she send revised time estimates of when installments on them would arrive. *Id.* She acknowledged that this was poor communication, but thought her time would be better spent producing the requested records—she spent the large majority of her PRA time working on these two men’s requests. *Id.*

In mid-August 2017, a new, full-time Public Disclosure Manager took over the PRO’s duties. CP at 107. The PDR Manager began going through all of the open requests in chronological order to finish them. She had not yet gotten to these requests when Mr. Cortland and Mr. Green sued for failure to supply the requested

records. *Id.* The PDR Manager pulled these requests to the top of the pile to restart processing and providing records. *Id.* The gap between when she restarted providing records and when Lewis County had last estimated an installment would arrive was about two months. *Id.* at 32, 34, 38. Thereafter, the PDR Manager continued to search for and provide records responsive to these requests, communicating with Mr. Cortland and Mr. Green regularly until the requests were fulfilled. *Id.* at 107. Lewis County also increased its capacity for PRA work by adding a full-time PRA advisory position in the prosecutor's office and by adding a half-time PRA position under the PDR Manager's supervision. *Id.* at 108.

The lawsuit below proceeded in two phases: merits and penalty. *Compare* CP at 30 (addressing the merits hearing on April 13, 2018) *with* CP at 106 (addressing the penalties hearing on Aug. 3, 2018). Mr. Green and Mr. Cortland prevailed in the merits phase. *Id.* at 37. The trial court determined that the two-month delay and lack of communication constituted an improper denial of the requests. *Id.* at 108.

The parties then entered the penalty phase. They stipulated that Lewis County withheld 359 records for 60 days, narrowing the scope of the argument to (a) the appropriate per-day penalty

multiplier under the *Yousoufian*<sup>1</sup> factors and (b) whether the two requestors were each entitled to a separate PRA penalty for the denial of access. *Id.* at 38-39, 108.

This time Mr. Cortland and Mr. Green lost: they argued for a high-end penalty, arguing bad faith and a need for deterrence, and sought a separate penalty for each man. CP at 109-110. The trial court rejected the claims of bad faith and need for deterrence. *Id.* at 109; *see also id.* at 87-94 (reciting the court's reasoning). It reasoned that Lewis County's staff was overwhelmed by Mr. Cortland's large number of requests, and that they had added capacity to alleviate the problem without being forced to do so by a court. *Id.* at 109, 90-91. The trial court adopted Lewis County's proposed amount of \$0.25 per day, per record. *Id.* at 110; 91, 92. It also adopted Lewis County's position that the award should be split between Mr. Green and Mr. Cortland because the requests were jointly made and jointly pleaded, so they merited a single, joint penalty. *Id.* at 110, 92. Based on these rulings, the trial court concluded that Lewis County prevailed on the appropriate penalty. *Id.* at 110.

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<sup>1</sup> *Yousoufian v. Office of Ron Sims, King Cty. Exec.*, 168 Wn.2d 444, 229 P.3d 735 (2010).

Mr. Green obtained a transcript of the penalty hearing as part of argument concerning the form of the order. CP at 40, 56-94. The Court did not adopt Mr. Green and Mr. Cortland's proposed order; it adopted Lewis County's. See CP at 93 (indicating that Lewis County would prepare an order); *id.* at 111 (signing Lewis County's order); *and compare id.* at 45-48, 95-101 (proposing a different order and arguing the court should adopt it instead of Lewis County's).

Mr. Cortland and Mr. Green sought costs and attorney fees as prevailing PRA plaintiffs. CP at 112-23. Mr. Green sought four categories of costs: (1) the \$240 filing fee; (2) \$150 in bench copy fees throughout the case; (3) a \$255 purchase of a transcript of the penalty hearing; and (4) gas money of \$146.35 for Mr. Green to drive to each hearing. *Id.* at 115-16. Lewis County conceded that the filing fee and the bench copy fees related to the merits phase were compensable, but argued that the penalty-hearing transcript and bench-copy fees did not pertain to litigation on which Mr. Green prevailed. CP at 139-40. It also argued that the mileage for Mr. Green to attend court related to Mr. Green's filming of the hearings for his open-government website, not the litigation, and so were not "costs" pertaining to the litigation. *Id.* at 135, 140.

The trial court awarded the filing fee and all of the bench copy fees for a total of \$390, but not the penalty-transcript or gas money. CP at 184. Its ruling on attorney fees discounted Mr. Cortland and Mr. Green's attorney-fee award considerably in the penalty phase because they did not prevail in the penalty phase. *Compare id.* at 133 (seeking many hours of compensation for penalty-phase work) *with id.* 182-83 (awarding attorney fees for only 18 hours).

Mr. Cortland and Mr. Green drafted the order reflecting the cost and fee ruling. See CP at 184 (indicating that the order was presented by their counsel and appears on their counsel's letterhead). Afterwards, they sought reconsideration of the ruling on costs, among other things. *Id.* at 189-90. Lewis County responded that the trial court properly apportioned costs to the issues on which Mr. Cortland and Mr. Green prevailed. *Id.* at 200-01. The trial court denied the motion to reconsider, and Mr. Green timely appealed. *Id.* at 208; Notice of Appeal (Feb. 7, 2019).<sup>2</sup>

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<sup>2</sup> Mr. Green did not designate the Notice of Appeal, but this Court has received it. See Perfection Letter (Feb. 28, 2019) (acknowledging receipt).

#### IV. ARGUMENT

##### A. APPELLANT HAS INVITED ANY ERROR IN THE ADEQUACY OF THE RECORD BY FAILING TO PUT ANY REASONING IN THE ORDER HE DRAFTED AND BY FAILING TO SUPPLY THE ORAL ARGUMENT OR RULING TO THIS COURT.

It is the Appellant's burden to supply a record demonstrating reversible error. See *Kane v. Smith*, 56 Wn.2d 799, 806, 355 P.2d 827 (1960); accord *Seattle v. Shields*, 60 Wn.2d 859, 862, 376 P.2d 535 (1962); *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). Here, Mr. Green invited any error in the adequacy of the record concerning the cost award: his lawyer drafted the order supposedly devoid of the necessary reasoning and failed to supply the transcript of the argument and oral ruling that would have explained the order.

The invited error doctrine "analyze[s] the impact a party's tactical choices have on alleged error." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). A party who sets up error in the trial court may not seek reversal on that issue on appeal. *Id.* The question is whether the appellant "affirmatively assented to the error, materially contributed to it, or benefited from it." *Id.* at 154.

Below, Mr. Green and Mr. Cortland were aware of the need to provide a record for review of the cost ruling. See CP at 193-94

(arguing that the trial court needed to establish a record for review of its attorney fee ruling). They nevertheless drafted the costs order to list a bare conclusion, devoid of any reasoning. *See id.* at 184. The reasoning was explicable from the briefing and argument before the court, *see* CP at 139-40, but they chose not to include any basis in the order. Nor did Mr. Green seek to have a transcript of the argument and oral ruling provided to this court to help elucidate the written order's meaning. *See City of Lakewood v. Pierce Cty.*, 144 Wn.2d 118, 126-27, 30 P.3d 446 (2001) (permitting such consideration). Having created the sparse record on which he now capitalizes, Appellant has invited error. The Court should decline to consider the claim that the record is inadequate, and affirm.

**B. THE TRIAL COURT PROPERLY APPORTIONED APPELLANT'S COST AWARD TO ISSUES ON WHICH HE PREVAILED.**

Besides, the record *is* adequate: it shows that the trial court properly apportioned Appellant's cost award to issues on which he prevailed. The apportionment was within the trial court's discretion, and this Court should affirm.

Whether to award fees and costs in a PRA case is reviewed *de novo*, but how much to award, including how to allocate fees and costs to a partially prevailing party, is reviewed for abuse of

discretion. *Sanders v. State*, 169 Wn.2d 827, 866-68, 240 P.3d 120 (2010). Appellant challenges the amount of the costs awarded based on the extent that he prevailed. The challenge is therefore governed by the abuse of discretion standard.

The PRA provides:

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

RCW 42.56.550(4). If the requestor prevails on only a portion of the issues, the court must apportion the costs and attorney fees to the issues on which the requestor prevailed. See *Sanders*, 169 Wn.2d at 865-68 (approving of the trial court's allocation of costs and fees below and apportioning costs and fees on appeal); see also *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) (discussing apportionment of attorney fees based on unsuccessful claims) *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 25, 332 P.3d 1099 (2014) (employing Bowers' rule in PRA cases).

When making this apportionment, the trial court considers who prevailed on merits-phase and penalty-phase issues. See *Sanders*, 169 Wn.2d at 848, 867-68, 870 (considering the remedy

for a violation of the “brief explanation” requirement—which the Court held was consideration during the penalty phase—to be one of the issues relevant to the allocation of costs and fees). The Court of Appeals recently confirmed this point in a case involving the same lawyers and litigants.<sup>3</sup> See *Green v. Lewis Cty.*, No. 77746-7-I, 2018 Wash. App. LEXIS 1631, at \*4-6 (Ct. App. July 16, 2018) (affirming Judge Hirsch’s discounting of the requested costs and fees by 75% because Mr. Green did not prevail on his penalty-phase claims, which constituted almost the whole case). Under these cases, a requestor “prevails” under the PRA, and therefore is entitled to costs and fees, only to the extent he or she was successful in his or her contentions in the litigation.

The record below makes clear that Mr. Green did not prevail on his penalty phase contentions. CP at 110. Accordingly, the trial court had discretion not to award penalty-phase expenses—like the

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<sup>3</sup> The unpublished Court of Appeals opinion is persuasive authority only, GR 14.1, but *Sanders* outlines the same point in binding authority. Also, the fact that Mr. Green lost on this precise issue in the prior case means that Mr. Green is issue-precluded from arguing that the penalty phase issues in this case “do not count” for purposes of the cost and fee allocation. *Christensen v. Grant Cty. Hosp.*, 152 Wn.2d 299, 307-08, 96 P.3d 957 (2004) (requiring identity of the issue litigated on the merits, privity with the prior litigant who lost, and a full opportunity to litigate to preclude an issue). The briefing in that appellate case, demonstrating that this was an issue fully and fairly litigated and decided, is available at [http://www.courts.wa.gov/appellate\\_trial\\_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByCase&courtId=A02&searchError=Invalid%20Search%20Type](http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByCase&courtId=A02&searchError=Invalid%20Search%20Type) under the original Division II case number, 50124-4. (The case was transferred to Division I for argument and decision.)

cost of the penalty-hearing transcript. See CP at 139-40, 200-01 (arguing the point). In fact, Mr. Green obtained the transcript in an unsuccessful effort to get the trial court to accept his proposed penalties order. *Id.* at 40, 45-48, 56-94, 95-101. The trial court rejected this contention and signed Lewis County's order. *Id.* at 93, 111. Because Mr. Green incurred this cost in aid of penalties litigation on which he did not prevail, the trial court properly declined to award it. *Sanders*, 169 Wn.2d at 865-68; *Green*, 2018 Wash. App. LEXIS 1631, at \*4-6.

The mileage fees were even less awardable.<sup>4</sup> Mr. Green attended all of the court hearings to film them for display on his open government website. CP at 135, 140. Lewis County argued, and the trial court agreed, that these journalistic costs were not compensable "costs" incurred in the litigation. See, e.g., RCW 4.84.010 (preamble) (defining "costs" as "the prevailing party's expenses *in the action*" (emphasis added)). The PRA's award of costs may be broader than RCW 4.84.010's from its use of the term "all costs," but it still meant to compensate costs, which are expenses in the litigation. See RCW 42.56.550(4) (permitting award of costs "incurred in connection with

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<sup>4</sup> Mr. Green concedes this point on appeal. Appellant's Op. Br. (July 10, 2019) at 6 n.1. Lewis County discusses it here to show that the trial court's reasoning in disallowing costs was sensible in all respects, suggesting that its reasoning was sensible on the grounds at issue here.

such legal action”). Because Mr. Green’s mileage was not such an expense, the trial court had discretion not to award it.

It is irrelevant whether these rationales are explicit in the order Mr. Green and Mr. Cortland drafted below. The arguments were in the briefing before the trial court, which it noted considering. CP at 176. The trial court can be deemed to have adopted them. RAP 2.5(a) (permitting this Court to affirm on any grounds supported in the record).

Likewise, this Court may affirm even if it quibbles with some aspects of the theory for disallowing costs: the cost award as a whole was within the trial court’s discretion. Mr. Green sought \$791.35 in costs below, but prevailed on only half of the case. The trial court had the discretion to discount the requested costs to the extent he was unsuccessful in the litigation, and so its award of \$390 in costs (about half of the request) was appropriate. See *Sanders*, 169 Wn.2d at 865-68; *Green*, 2018 Wash. App. LEXIS 1631 at \*4-6. The Court should affirm.

Finally, Mr. Green has tacitly conceded that the trial court’s cost analysis is correct by failing to challenge the similar ruling below on attorney fees. The trial court discounted the attorney fee award because Mr. Cortland and Mr. Green had not prevailed on penalties.

CP at 182-83. Mr. Green did not assign error to or address this ruling, suggesting that he concedes it is right. See *generally* Appellant’s Op. Br. (July 10, 2019) (not seeking any change to the attorney-fee ruling below). Yet, the operative language for costs and fees is the same: PRA plaintiffs who “prevail” are entitled to “all costs, including reasonable attorney fees, incurred in connection with such legal action.” RCW 42.56.550(4). PRA case law makes clear that the attorney fee award is to be apportioned only to the extent the requestor “prevails.” *Sanders*, 169 Wn.2d at 865-68; *Bowers*, 100 Wn.2d at 597; *O’Neill*, 183 Wn. App. at 25; *Green*, 2018 Wash. App. LEXIS 1631, at \*4-6. If Mr. Green concedes that point for attorney fees, he must equally concede it for costs—the term “prevails” is used in a single provision for both costs and fees. RCW 42.56.550(4). The record on attorney fees therefore shows that the trial court’s cost ruling was correct. The Court should affirm.<sup>5</sup>

**C. APPELLANT IS NOT ENTITLED TO COSTS AND FEES ON APPEAL.**

A requestor who prevails against an agency on appeal may claim appellate costs and attorney fees. *Sargent v. Seattle Police*

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<sup>5</sup> If, *arguendo*, the Court holds that the record concerning the cost award is inadequate, it should remand for entry of appropriate findings and conclusions. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

*Dep't*, 179 Wn.2d 376, 402, 314 P.3d 1093 (2013). But, because the Court should affirm, Mr. Green will not prevail and should receive no costs or attorney fees. *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). Even if this Court remands for entry of further findings and conclusions, Appellant will not “prevail,” and costs or fees would be premature. See *Concerned Ratepayers v. PUD No. 1*, 138 Wn.2d 950, 964, 983 P.2d 635 (1999) (finding an award of appellate costs and attorney fees premature when remanding for further factual development); *City of Lakewood v. Koenig*, 160 Wn. App. 883, 895-97, 250 P.3d 113 (2011) (same). The Court should not award costs and fees.

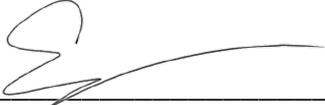
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**V. CONCLUSION**

Mr. Green challenges the trial court's award of only some of his requested costs. The Court should reject the challenge: Mr. Green invited any error in the adequacy of the record for review, and in any event the record is adequate. The trial court properly awarded him costs only for issues on which he prevailed in the litigation. Because the cost award was within the trial court's discretion, this Court should affirm.

RESPECTFULLY submitted this August 9, 2018.

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