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Court of Appeals
Division III
State of Washington

No. 343405

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

RICHARD EGGLESTON,

Appellant,

v.

COUNTY OF ASOTIN, et al.

Respondents

**APPELLANT'S REPLY BRIEF /
CROSS RESPONSE**

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I. INTRODUCTION

Richard Eggleston requested three sets of documents from Asotin County. The documents all related to the 10-Mile Bridge replacement and road realignment project for the County. Though the County denies owning, using or keeping the records, the objective facts demonstrate otherwise.

Four of the first nine requests are within the statute of limitations; the County's actions have tolled the statute of limitations, or raised the necessity of equitable tolling for the first five requests.

The trial court erred in calculating penalties that were awarded to Mr. Eggleston by refusing to account for valid requests and the County's violations accompanying those requests.

On these issues the trial court should be reversed and the case remanded.

II. ARGUMENT

A. The documents sought are Public Records

Public records are broadly defined in Washington to include nearly every conceivable document related to the conduct of government

business.

There are three sets of public records at the heart of this case: 1) A proposal which is believed to be an email dated January 11, 2002; 2) the April Plans; and 3) the July Plans. These documents relate to the conduct of Asotin County in relation to a bridge and road realignment project.

All three sets of documents are public records, and the trial court erred in finding that the undisclosed email of January 11, 2002 is not a public record.

Because the record from below contains a trial court assessment of witness credibility, the standard on review is to accept unchallenged factual findings as true for purposes of review and to find support in the record for challenged findings. *Cowles Publishing v State Patrol*, 44 Wn.App. 882, 888-89, 724 P.2d 379 (1986). The reviewing court is to independently determine the scope of the PRA exemption and disclosure provisions. *Id.*, at 889. Further, because the PRA mandates that its provisions be “liberally construed” to promote government accountability; even if the burden is on the requestor for threshold issues it will not be a heavy burden. *Public Records Act Deskbook*, (2d Ed. 2014) §16.3(5) .

1. The undisclosed email is a public record.

A public record is defined as a writing that relates to the performance of a governmental function that is prepared, owned, used, or retained by a public agency. RCW 42.56.010(3). The term “governmental function” is to be interpreted broadly to make as much information as possible disclosable under the PRA. *See: Tiberino v Spokane County*, 103 Wn.App. 680, 687, 13 P.3d 1104 (2000).

The County downplays the January 11, 2002, email calling it, “inconsequential” (BR, 20) and calling it a “transmittal email” (BR,25). There is no factual basis for those claims; but even if it was “inconsequential” it would be a public record.

Contrary to the County’s claims, the record does provide a strong suggestion of what is in the email. Mr. Eggleston testified:

But as we walked off the hill, I walked up to Kevin Cannell, and I said, “Kevin, how long have you been working on this project? And he says, “Well” - - and he was a bit taken back because he knew the problems that faced the design at that point. He said, “Well, you know, maybe a month or two, uh, I have been putting the report together. But I guess since about 2001 when I wrote my proposal, I wrote in there there was a significant, there was an extremely significant cultural resource at this location. I guess I should have been more specific.” Which was the very reason that I didn’t, that I then followed up with, “I guess I would like to see that proposal,” and asked for the

proposal from the archeological work.

RP, Vol 2, p. 302, l. 14 - p. 303, l. 2.

The proposal is more than some email transmittal sheet. It contains important information about the project area and the archeologic resources there; it is not “inconsequential” as the County now claims. Thus we know that a document with important information was sent via email on January 11, 2002. This important information was conveyed to the County’s agent¹ for purposes of obtaining the County’s permission to hire the subcontractor and to provide important information and direction regarding the project. The January 11, 2002, email is a public record.

2. It relates to the conduct of government or the performance of a governmental function.

In *Tiberino* the court discussed that for an email to meet this definition, the public must have a “legitimate public interest” in the document. *Tiberino*, at 690.

The County argues that the email “has no relevance to an agency’s conduct or performance.” BR 24. The County’s assertions are wrong and

¹ See §3(i), “The document was owned by the County”, *infra*.

lack any facts offered in support of their claim. Conversely, that the public would have a legitimate interest in the proposal of the man who was hired to help avoid hitting archeological sites is plain to be seen.

The authorization of the hiring of a subcontractor is the performance of a governmental function. Reliance on a proposal in order to give direction to a subcontractor is a government function, even when done by a *de facto employee*. The trial court erred in not finding that this is a public record, and this case should be remanded.

3. It was owned, used and retained by the County

A public record must be produced if owned, used or retained by the agency. RCW 42.56.010(3).

The contract between the County and TD&H confirms to the County ownership of the still undisclosed email. The June 5, 2002, letter confirms its use. And TD&H was required to preserve the document. Though the County will alternately argue that this undisclosed email does not exist, such claim is without evidentiary support as the County has never asked TD&H for it.

i. The document was owned by the County

The County claims that the email was between two private parties before the contract with the County; but the facts don't support this. TD&H, in response to some solicitation from the County, put in a bid. The County issued a "notice-to-proceed" letter to TD&H in November of 2001 (RP Vol.I, p. 7; CP274). It is undisputed that pursuant to that authority from the County, TD&H began arranging for subcontractors (like Kevin Cannell); but that those subcontractors could *only* be hired with written approval from the County. BA, App.F,p. 5. It is only reasonable to conclude that a subcontractor's proposal was considered by the County in providing approval for the hiring of that contractor.

But even if the "notice-to-proceed" was meaningless, the Contract gives ownership of these documents to the County². CP1029, BA App.F p.4. The terms "documents³" and "other work products" encompass proposals which were necessary to obtain written authorization to hire a

² The County argues they do not "own" the record and point to CP 1042 as support of that proposition. However, the pertinent language is not on CP 1042, it is found on CP1029 (*see also*: BA, App.F, p. 4). The pertinent language gives ownership to the County of "all designs, drawings, specifications, *documents and other work products*"

³ Judge Grosse writes: "[p]articularly noteworthy is that the Act specifies *three* times that courts must construe it liberally in favor of disclosure. ... Virtually no other legislation repeats three times how it should be interpreted. Court should never ignore this "thrice-repeated" demand." *Public Records Act Deskbook*, §2.2(1), (2d Ed. 2014)

subcontractor.

The trial judge found that the contract “clearly says that the County owns the documents.” RP Vol 4, p. 604, ll. 10-11. Although these words were uttered regarding the April and July Plans, they apply equally to the undisclosed email (“the Proposal”) which was obtained to secure the County’s authorization to hire a subcontractor.

The County argues that Cannell was not even a sub-consultant when the email was prepared, and therefore it is not owned by the County. BR 22. The County errs; the operative fact is that TD&H was the County’s agent at that time. It isn’t a question of Mr. Cannell’s status at the time it was prepared.

The County owns\ed this still undisclosed email. The trial court erred in not finding that this is a public record, and this case should be remanded.

ii. The document was used by the County

“Information that is reviewed, evaluated, or referred to and has an impact on an agency’s decision-making process would be within the parameters [of use of the information.]” *Concerned Ratepayers Ass’n v Public Utility Dist. No. 1*, 138 Wn.2d 950, 960-61, 983 P.2d 635 (1999).

The County argues that it didn't use an email it "never saw." BR 22. But, the record doesn't say the County never saw it. In response to Mr. Eggleston's first request, the County stated: "Kevin Cannell is contracted through Thomas Dean & Hoskins (TDH) and hence TDH has managed said correspondence. Therefore Asotin County may not have all requested documents in our files. ..." CP 39.

The County responded to the second request by stating they were "uninterested" in the proposal. CP 44.

The other 7 requests are similarly lacking in any denial that it was seen or used. The record does not support the County's claim.

There are two specific indicators of use: 1) the June 5, 2002, letter which referenced and relied on the undisclosed email; and 2) the contract provides that TD&H "shall not subcontract for the performance of any work ... without the prior written permission" of the County. CP1030, BA App.F, p. 5. Kevin Cannell was hired as a subcontractor, experience teaches that such hiring is done upon reliance on a proposal. Either indicator is sufficient for use.

The trial court erred in not finding that this is a public record, and this case should be remanded.

iii. The document was retained by the County

The County concedes that there is “no dispute that to the extent this document existed, it was possessed by TD&H...” BR 21. They then argue that “there is no evidence TD&H retained it, either.” BR 24. We don’t know whether TD&H retained them, because the County never asked for them. But, as was demonstrated by the deposition of Randy Noble, TD&H did maintain records for years into the past: he testified he went through 800 emails that were all prior to 2010⁴. RP Vol 1, p. 196.

But whether it has been retained is of no moment. As we see in *Neighborhood Alliance of Spokane County v Spokane*, 172 Wn.2d 702, 261 P.3d 119 (Wash. 2011), if the agency had the document, and then destroys it (or allows it to be destroyed) because of an inadequate search, the agency is still liable for the breach of the Act.

The trial court erred and this case should be remanded on this issue.

⁴ In 2003, prior to the first request involved in this case, Mr. Eggleston wanted some records which were held by TD&H. The County authorized TD&H to release the records to Mr. Eggleston. RP, Vol. 1, p. 28, ll. 7-19. But the key is, the records at TD&H were under the control of the County. This is the instance referenced by the County at BR 28, fn16. Mr. Eggleston asked for *8 existing drawing sheets*. The County cooperated with TD&H in *over-charging* Mr. Eggleston by over \$1400 ... which is further evidence of the “toxic” relationship between the County and Mr. Eggleston. RP, Vol. 1, p. 28, l. 20 - p. 29, l. 10.

B. Belenski Rule, Silent Withholding, Non-responses and Equitable

Tolling are all reasons this case should be remanded

Mr. Eggleston made nine (9) requests for the still undisclosed email, which he called the Proposal. *Even if Belenski v Jefferson County*, 378 P.3d 176 (Wash. 2016) applies to bar requests made more than one year prior to filing suit, requests 6-9 are within the statute of limitations, and this case should be remanded. The County did not respond to requests 6-9 except to admit that Eggleston “also requests penalties for four more requests within the limitations period.” BR20 at fn 10.⁵ The County also recognizes that Mr. Eggleston has been clear that requests 1-9 were various attempts to obtain the same document; none of which resulted in the production of the Proposal (the still undisclosed email).

Belenski requires two factual determinations: 1) whether a response was sufficiently final to trigger the statute of limitations; and 2) if the response was sufficiently final; should equitable tolling be applied to allow

⁵ In that footnote, the County claims that “[a]ll these requests sought “the Proposal,” a misnomer based upon Eggleston’s erroneous belief TD&H had issued a written request for sub-consultant qualifications when no such thing happened. CP1069.” The County errs in their statement. It is true that requests 1-9 were for “the Proposal”, but the County apparently misapprehends that “the Proposal” was FROM Kevin Cannell TO TD&H. *See §A(1), supra, see also: CP274*. This error seems to be unique to the Brief of Respondents.

this case to proceed? The trial court did not make findings sufficient to conclude one way or the other.

The issue of equitable tolling was not before the trial court on summary judgment. In order to address that, the case needs to be remanded.

Further, the answer to the first *Belenski* question, that the responses were not sufficiently final as to trigger the statute of limitations, controls, and the case should be remanded for a trial on the first nine requests.

C. A request is a request, even if it is made a second time

There is no limit on the number of requests a person may make under the PRA. *Zink v City of Mesa*, 140 Wn. App. 328, 340, 166 P.3d 738 (2007).

The County doesn't challenge this point⁶. While a court may *group* requests by categories of records; to refuse to consider the request is

⁶ Instead of challenging this correct statement of the law, the County re-asserts that "There is no evidence that the County ever received or used any plans from the June/July 2012 period, other than the Nez Perce set." BR 15. But such a claim ignores the testimony of Randy Noble of TD&H, where he stated that Craig Miller of Asotin County ordered the production of the April Plans (RP Vol 1, p 178, ll 7-14) and that the April Plans were given to the County. RP Vol 1, p. 170, l.20 - p. 171, l. 9. He also testified that the July Plans were provided to Asotin County. RP Vol.1, p. 178, l. 18 - p. 179, l. 2. *See also*: discussion and facts *infra* at Finding 2.2.

error for which the case should be remanded. The error of refusing to consider requests is amplified in the application of the *Yousoufian* factors, as shown *infra*.

D. A Proper Application of the Penalty Factors Results in Greater Penalties

The trial court did consider the *Yousoufian* factors, and Mr. Eggleston has taken exception to no specific Finding of Fact or Conclusion of Law, because each of the Findings 2.1 - 2.30 are accurate, and Conclusions 3.1 - 3.14 are accurate; the problem comes in the Court's letter ruling of December 17, 2015 applying the *Yousoufian*⁷ factors, and awarding insufficient penalties. The trial court, after finding that additional demands were made for public records (Findings 2.10, 2.12, 2.14⁸), refused to consider them and their effect on the *Yousoufian* factors.

⁷ *Yousoufian v Office of Ron Sims (Yousoufian V)*, 168 Wn.2d 444, 229 P.3d 735 (2010).

⁸ The trial court did not specifically find each of these to be a "request"; instead the trial court found them to be a "demand" which was "characterized in the Complaint 'as another public records request.'" CP 485-86; *see also*: CP538. Mr. Eggleston asserts that a "demand" is as operative under the PRA as a "request"; to the extent it is construed that a "demand" is not a "request" under the PRA, Mr. Eggleston takes exception to the Findings. However, because the PRA does not require any special language (*see i.e. Wood v Lowe*, 102 Wn.App. 872,878, 10 P.3d 494 (2000); WAC 44-14-04002(1)) and the intent of the "demand" was understood by the County (*see i.e.*: CP538) the error comes in the failure to hold the County accountable for

See: BA, 36-7. This is an abuse of discretion. *State v Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995); *Olver v Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007).

By arbitrarily refusing to consider valid requests AND the violations and bad acts that are associated with those requests, the trial court artificially reduced the proper amount of damages.

The trial court further exacerbated the foregoing problem when it refused to acknowledge the problems with the County's actions. There is a of a lack of fairness and impartiality that is demonstrated when the Court finds: 1) that the County's relationship with Mr. Eggleston was antagonistic and toxic; 2) the County had an ulterior motive; 3) the County's reasons were not entirely reasonable (CP 562-63); 4) that the County's actions were "inexplicable" (CP492); 5) the County did not ever respond to the August 24, 2012, request or the September 7, 2012, demand (Findings 2.13 and 2.15); and so on, only to then refuse to find bad faith (CP540); to find that the responses were timely (CP539); despite the

their violations related to these demands/requests, and not to the Finding as written.

demonstrated deficiencies⁹, to find “there is no evidence the Public Works staff was not adequately trained (CP539), and so on. The trial court has thus abused its discretion.

The trial court’s analysis of *Yousoufian* factors touched on the County’s errors, but chose to gloss over the problems, and as a result it awarded insufficient penalties.

F. Attorney Fees

The County did not respond to this section.

III. CONCLUSION

The trial court erred in granting summary judgment against Mr. Eggleston for the first nine requests, which were made for a public record: the still undisclosed email. The document was owned, used, and retained by the County. *Belenski* does not operate to cut off these claims, and even if it did, requests 6-9 are not barred by the statute of limitations. This case

⁹ No request resulted in an adequate search (*see i.e.*: BA, App.E, p.3; RP Vol.1, p. 71, 74). The staff did not know what a withholding log was (*see i.e.*: RP Vol.1, p. 96, ll 4-13; RP Vol. 3, p. 445, ll 3-9). The staff did not know what a search log was (*see i.e.*: RP Vol. 3, p. 445, ll 8-9; RP Vol.3, p. 481, ll 6-10). These are basic concepts in the PRA, and for staff, *including the Public Records Officer* for the County to not know these is clear evidence of *lack* of adequate training.

must be remanded on this issue.

The trial court further erred by refusing to consider valid requests, and refusing to consider the County's bad actions in regards to those unconsidered requests. This case must be remanded on this issue.

And the trial court abused its discretion in the consideration of the *Yousoufian* factors. This court must either correct the error by the lower court or remand on this issue with instructions for the trial court.

IV. RESPONSE TO CROSS-APPEAL

In addition to general challenges to two (2) letter rulings and the June 11, 2015, Findings of Fact and Conclusion of Law, the County specifically challenges three (3) findings of fact, nine (9) conclusions of law, and four (4) mitigating or aggravating factors. The Findings of Fact are supported by substantial evidence; the Conclusions are supported by Findings, facts and the law; and the County's objection to the mitigating/aggravating factors is misplaced. The cross-appeal should be denied and the trial court affirmed in this regard.

A. Findings of Fact and Conclusions of Law

The standard of review is that unchallenged findings are a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *Perry v Costco Wholesale, Inc.*, 123 Wn.App. 783, 792, 98 P.3d 1264 (Div. 1 2004) citing: *City of Tacoma v State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Where live testimony has been taken in a PRA action, appellate court's review the findings for support of substantial evidence. *Zink v City of Mesa*, 140 Wn.App. 284, 292-93, 857 P.2d 1083 (1993).

Finding 2.10: “*Mr. Eggleston, through his attorney, made a request for public records on August 2, 2012, seeking either the plans requested by Mr. Eggleston on April 26, 2012 and July 17, 2012, or a withholding log (Exhibit 13)[.]*”

Exhibit 13, admitted without objection, is the request that was sent to the County. RP Vol 2, p. 258, ll 5-11. There is no dispute it was sent, or received; Exhibit 14 is the County's response to the August 2, 2012, request (Exhibit 13).

The finding is supported by substantial evidence and therefore

must be affirmed.

Finding 2.21: “*TD&H gave those April Plans to the other agencies involved in the 10 Mile project on April 23 or 24, Asotin County used these plans by providing them to their contractor for use in obtaining bids on portions of the work[.]*”

Exhibit 1, admitted without objection, is a copy of the April Plans that were provided by TD&H at the April 23 or 24, 2012 onsite meeting. RP Vol. 1, p 172, ll 1-12. Mr. Randy Noble, project manager for TD&H, testified these were provided at the April 23 or 24th meeting. *Id.*

Exhibit 55 was admitted over the County’s objection¹⁰. RP Vol 3, p 506-07.

On May 7, 2012, “erikg” (the County’s contractor) emailed Craig Miller (the County’s Project Manager), stating:

I’m working on your pricing ...
How many SF of wall are we going to build at Eggleston.
Item is 650 LF. Is this going to be a hand laid, mortar joint,
or what do you see?

Mr. Miller responded with details. (EX 55)

¹⁰ The County asked for a continuing objection because, “I’m concerned that there would be evidence here than another attorney representing the County on that lawsuit isn’t here to take care of.” RP Vol 3, pp 494-95. The Court overruled due to the relevance to the Yousoufian factors. *Id* at 495-496.

On May 11, 2012, Chris Ward, modified the “Eggleston rockery area detail” and the length of the rockeries for pricing extended to 952 lineal feet (LF). EX 55.

The finding is supported by substantial evidence and therefore must be affirmed.

Finding 2.26: *“TD&H had a current set of plans saved as a portable document file (.pdf) dated June 21, 2012, these plans were used by Asotin County by providing them to their contractor for use in obtaining bids for portions of the work[.]”*

Exhibit 4 is a copy of engineer drawings current as of July 17, 2012, (dated June 21, 2012) and which was admitted without objection. RP Vol 1, p 176, ll 8-11.

Exhibit 6 was admitted over objection of counsel¹¹. RP Vol 1, p 189, ll 9-20. The last two (2) pages of this exhibit are emails exchanged between the County’s Project Manager, Craig Miller, and TD&H’s project manager, Randy Noble, showing that the County used the plans for cost

¹¹ The County objected to the admission because, “[h]e has read the relevant parts. He has walked it through. I don’t think he needs to have them admitted. If he was going to admit them he should have just admitted them at the outset and gone for it. But I suffered through it, you suffered through it, I don’t think he needs now to put more stuff in.” RP Vol 1, p. 189, ll 11-17.

purposes and determined to eliminate rockery walls to save money. The known current plans at that time were the July Plans (dated June 21, 2012).

The finding is supported by substantial evidence and therefore must be affirmed.

Conclusion 3.4: *“The County must prove beyond a material doubt that it conducted an adequate search for records after receiving a request, and [sic] adequate search is one that covers every place a record is reasonably likely to be found; the County knew the plans were reasonably likely to be found at TD&H and did not search there in violation of the duty to conduct an adequate search.”*

Complying with a proper search is of sufficient importance that the Supreme Court has directed that it is the agency’s burden to prove “beyond a material doubt” that the search was adequate. *Neighborhood Alliance*, at 721/

The *Neighborhood Alliance* court offered additional instruction about what is an adequate search:

Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. *Valencia-Lucena v. U.S. Coast Guard*, 336 U.S.App. D.C. 386, 180 F.3d 321, 326 (1999). The search

should not be limited to one or more places if there are additional sources for the information requested. *Valencia-Lucena*, 180 F.3d at 326. Indeed, " the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby v. U.S. Dep't of Army*, 287 U.S.App. D.C. 126, 920 F.2d 57, 68 (1990). This is not to say, of course, that an agency must search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found.

Id., at 720.

Thus we see that the Court accurately stated the law. Findings of fact 2.22 - 2.28 (all but 2.26 are not challenged on appeal and therefore deemed a verity, and as shown above, 2.26 is supported by substantial evidence) support this conclusion. Therefore, this Court should affirm the trial court's conclusion.

Conclusion 3.5: *"In response to the July 17, 2012, request, the County provided the "Nez Perce Submittal" but due to the inadequate search did not produce or identify the responsive document which was withheld, resulting in a silent withholding and a violation of the PRA[.]"*

This conclusion is supported by Finding 2.24 - 2.28. Four of the five supporting findings are unchallenged and therefore verities on appeal, and the fifth Finding (2.26) is supported by substantial evidence.

Every public record is subject to disclosure in a Public Records

request; a record may be exempt from production. *Neighborhood Alliance*, at 721. (See also: *Sanders v State*, 169 Wn.2d 827, 240 P.3d 120 (Wash. 2010).) If a document is not disclosed, it results in a silent withholding. The Washington Supreme Court has condemned silent withholdings in *PAWS II*:

The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request. ...

The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. See *Fisons*, 122 Wash.2d at 350-55, 858 P.2d 1054. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.

Progressive Animal Welfare Society v Univ. Of Wash, (*PAWS II*) 125 Wn. 2d 243, 270, 884 P.2d 592 (1994).

The failure to disclose a document is a silent withholding. Both the April and July Plans were silently withheld from Mr. Eggleston as neither were disclosed, despite both being in existence and available. On direct examination, the County's engineer testified he did not create a withholding index, nobody created one to his knowledge, he never saw

one, and never heard from anyone who had seen one. RP Vol. 1, p. 94, l 20 - p.95, l. 20.¹²

The Conclusion is properly supported by fact and is a correct statement of law, therefore this Court should affirm the trial Court in this regard.

Conclusion 3.6: *“The April 26, 2012, request sought the production of the April Plans; these plans were wrongfully withheld until December 10, 2012, in violation of the Public Records Act[.]”*

This conclusion is supported by findings: 2.3 and 2.4) Asotin County and the Public Works Department are public agencies; 2.7) the County owned the plans; 2.8) Eggleston asked for the April plans; 2.17) the County provided the plans on December 10, 2012 (which is well after the final construction plans were issued in September, 2012); 2.18) the County claimed an exemption for these plans; 2.19) the County did not provide a withholding log; 2.20) the plans existed as a .pdf dated April 13, 2012; 2.21) the plans were given to other agencies and used by the County; 2.22) the County denies knowing of the plans, but admits

¹² The topic of silent withholding is also addressed in the “Closing Arguments and Memorandum of Law” (CP 317 - 369). Mr. Eggleston reasserts the argument found there in at CP343-345. The “Closing Arguments...” is attached hereto as Appendix G for convenience of the Court.

knowing that if plans existed TD&H would have them; and 2.23) the County did not ask TD&H for the plans.

The conclusion is properly supported and this Court should affirm.

Conclusion 3.7: *“The July 17, 2012, request sought production of the July Plans, these plans were not provided to Plaintiff by the Defendants in violation of the PRA[.]”*

This conclusion is supported by findings: 2.3, 2.4, 2.7,) see above; 2.9) Eggleston asked on July 17, 2012, for the “current project plans”; 2.24) the County gave the Nez Perce Submittals to Eggleston; 2.25) no withholding log was generated regarding this request; 2.26) the plans existed as a .pdf dated June 21, 2012 and were used by the County; 2.27) the County denies knowing of the plans, but admits knowing that if plans existed TD&H would have them; and 2.28) the County did not ask TD&H for the plans.

The conclusion is properly supported and this Court should affirm.

Conclusion 3.8: *“Asotin County asserted an exemption to the April 26, 2012, request for which they did not offer adequate justification at trial.”*

Disclosure of a record is “mandated unless the agency can

demonstrate proper application of a statutory exemption to the specific requested information; the agency bears the burden of proof.” *Sargent*, at 385-86.

This conclusion is supported by findings: 2.7) the County owned the requested Plans; 2.18) the County asserted an exemption claiming the Plans were preliminary; 2.20) TD&H had the plans (dated April 13, 2012); 2.21) TD&H gave those plans to the other agencies involved in the 10 Mile project, and the County used them.

The County claims that “the court’s ruling is *devoid* of any analysis” as to whether the documents were exempt. BR., p30. The County is wrong.

The burden of proving the applicability of an exemption lies on the agency. RCW 42.56.550(1). The trial court recognized this. Citing to 42.56.210¹³, the court held that an exemption is inapplicable if it does not protect a vital governmental interest; and in establishing this element the County produced “no testimony” that disclosure would jeopardize

¹³ 42.56.550(1) states, *inter alia*: (1) Except for information described in *RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.

anything. CP492.

The Court concluded against a vital government interest being affected. CP492. However, the County claims there is a vital governmental interest involved (BR: p. 19) but fails to provide any citation to the record where there is any testimony or evidence to meet their burden, or even support their claim. For this reason alone, the claimed exemption fails and the Conclusion of law should be affirmed. But, even if this was insufficient, there is more.

In order to rely on the “deliberative process exemption” an agency must show 4 things: 1) that the records contain predecisional opinions or recommendations of subordinates¹⁴ expressed as part of the deliberative process; 2) that disclosure would be injurious to the deliberative function of the process; 3) that disclosure would inhibit the flow of recommendations and opinions; and 4) the materials covered by the exemption reflect on policy recommendation (not policy implementation or raw factual data). *PAWS II*, at 256. The County did not meet these elements.

First, raw factual data is not “opinions or recommendations.”

¹⁴ Subsequent decisions of Washington courts has removed the “of subordinates” portion of this element.

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 134, 580 P.2d 246 (1978).

The testimony, from Mr. Bridges and Mr. Noble and the County's expert Mr. Ayers, establish that the plans are "graphical representations of facts and data". (*See i.e.*: RP Vol.1, p. 113, ll, 2-4; p 122, ll 11-15; Vol.2, p 332, ll 3-6; p. 334, ll 2-12; p 373, ll 13-15.) The plans are not opinions and recommendations that could be exempt.

Further, the Supreme Court has rejected the argument that the "exemption applies to all documents in which opinions are expressed regardless of whether the opinions pertain to the formulation of policy." *PAWS II*, at 256. In *Cowles Publishing*, the court distinguished between *policy implementation* and *policy making*. It only applies to policy making. Even if the plans contained opinions (which they don't), they would go to the implementation (the how) of the policy decision which had been made (to replace the bridge and the approach)¹⁵. Mr. Eggleston

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ACLU v City of Seattle, 121 Wn.App. 544, 89 P.3d 295 (Wash. App. Div. I 2004), is instructive in this regard. The ACLU was seeking a list of negotiation issues in the union negotiations. The Court noted that this was exempt as "[p]reliminary drafts, notes, recommendations ... in which opinions are expressed or policies formulated or recommended." Recommendations and opinions regarding *policy formulation* are exempt, but not those regarding *policy implementation*. The *ACLU* court described why their case was about *policy formulation*: "The City's negotiators are not free to adopt their own strategies and priorities for the City Council. Rather they must confer with the governing body on a regular basis to adopt and respond to the proposals and counter-proposals that emerge from sessions at the bargaining table." The instant case is the opposite ... the policy had been made, the implementation was being ironed out, and the

reasserts the argument found in the Closing Argument at pp. 29-32 (*see*: Appendix A).

The claimed exemption is not supported by the necessary testimony or evidence which demonstrates that disclosure would be injurious to the deliberative function of the process or that disclosure would inhibit the flow of recommendations and opinions. In fact, Mr. Eggleston was recognized as a Section 106 Consulting Party¹⁶ so he could contribute to the flow of recommendations and opinions in helping protect the archeological resources (RP, Vol.1, p 139; RP Vol 2, p. 244, ll 9-22) (he was also working with the Chairman of the Tribe and the tribal attorney (RP Vol.2, p. 290, ll 20-25)) ; the withholding of the document from him is counter-productive in this regard. The claimed exemption fails.

The trial court also specifically found that the claimed exemption did not protect a vital government interest. CP492. The County

governing body was to be updated on when the work would begin again. (*See i.e.*: RP Vol 1, p. 59-60) Further, unlike the union negotiations in *ACLU*, there is nothing in the record stating the negotiations in the instant case were closed ... indeed, we know the meeting on April 23 or 24 was held in the open at the construction site.

¹⁶ Other parties involved through Sec. 106 included: Nez Perce Tribe (RP, Vol.1p 139), Washington Department of Archeologic and Historic Preservation (RP, Vol.1, p 136).

complains that the trial court required they make a showing that disclosure would have had some deleterious effect (BR, p. 40); but it is the County's burden to prove an exemption applies. The County cites *ACLU v City of Seattle*, as supporting their position (*Id.*), but their reliance is misplaced.

The *ACLU* court stated:

We also conclude that the City has established that disclosure would be injurious to the deliberative or consultative function and inhibit the negotiation process. It submitted eight declarations explaining the negative impact of disclosure on successful negotiations. The declarations discuss the importance of keeping collective bargaining confidential, as well as how merely disclosing tentative issues lists, like those in this case, could negatively affect the process of reaching agreement through negotiations.

ACLU, at 552-53.

Conversely, in the case at bar, the trial court found

“there was no testimony that that [sic] any disclosure of preliminary or ‘work-in-progress’ drafts to the public or to the plaintiff would have put in jeopardy any approvals or would have jeopardize [sic] any negotiations with other agencies involved.”

CP 492.

The conclusion is properly supported by finding and by the record in this case. This Court should affirm the trial court in this regard.

Conclusion 3.9: *Asotin County had a contract with TD&H that*

specifically gave the County ownership of the records, the documents were produced using public funds, they were produced using public funds [sic]. Asotin County owned the records in question[.]

Finding of Fact 2.7 supports this conclusion. Additionally, Exhibit 23 supports this conclusion.

The conclusion is properly supported by finding and by the record in this case. This Court should affirm the trial court in this regard

Conclusion 3.10: *The April Plans were used by Asotin County when they were provided to the other interested agencies at the April 23 or 24 meeting, they were further used when they were provided to Asotin County's contractor for purposes of obtaining bids for some of the work[.]*

This conclusion is supported by Findings of Fact 2.21. As demonstrated above, this Finding is supported by substantial evidence. The conclusion is properly supported by findings and by the record in this case. This Court should affirm the trial court in this regard.

Conclusion 3.11: *The July plans were used by Asotin County when they were provided to Asotin County's contractor for purposes of obtaining bids for some of the work[.]*

This conclusion is supported by Finding 2. 26. As demonstrated

above, this Finding is supported by substantial evidence. The conclusion is properly supported by Finding of Fact and by the record in this case. This Court should affirm the trial court in this regard.

Conclusion 3.12: *TD&H is not a public agency but was a contractor with specific, though limited agency, and a public agency may not contract their way around the Public Records Act and avoid the duties imposed therein; therefore, even though the records were stored on TD&H computers, Asotin County retained them[.]*

This conclusion is supported by Findings: 2.7. This conclusion is further supported by Exhibit 23, and by the law as follows.

The County argues that since the trial court did not perform a *Telford* analysis and find that TD&H is a *de facto* public agency, that the Public Records Act should not apply to the records. BR 29-36. But such an argument misses the mark: the proper analysis (as was done by the trial court) is the nature of the document.

If a document is a public record, then it is meaningless whether the public agency has the document held by a public or private agency. This analysis is a re-statement of the holding in *Concerned Ratepayers*; which turned on the characterization of a document retained by a private

company, Cogentrix, a general contractor¹⁷. The Supreme Court held that the document was a public record subject to disclosure because it had been used by the public agency even though the agency may not have possessed the record. “[R]egardless of whether an agency ever possessed the requested information, an agency may have “used” the information within the meaning of the Act [if any of three elements are met].” *Id* at 960.

Thus we see that the relevant inquiry is to the character of the document, not the character of the company that held it at the time of the request. The County’s argument that the trial court erred by not employing a *Telford v Thurston County Bd. Of Comm’rs*, 95 Wn.App. 149, 974 P.2d 886 (1999) analysis is without merit.

The County seems to argue that if a private agency holds a record for a public agency the record is not subject to the PRA. BR at 29-30. There is no support in law or fact for that position¹⁸.

¹⁷ The document at issue related to the “design specifications of [a] turbine generator.” *Id* at 953.

¹⁸ The County argues that the trial court erred by finding that TD&H “is not a public agency but was a contractor with specific, though limited agency...” and that the County “retained” the documents despite being stored on TD&H computers. In this the County ignores the law of principle and agent, which is so well established in law as to not need further citation or argument. Further, as set forth *supra*, the Court found that TD&H was a *de facto* employee, a finding which is supported by substantial evidence.

Were the Court to adopt this proposition, public agencies could completely avoid the requirements of the PRA by simply contracting with a private company to store the agency's records. Such a result would be absurd and effectively repeal the PRA.

A public agency cannot contract its way around the PRA. *Gendler v Batiste*, 174 Wn.2d 244, 274 P.3d 346 (Wash. 2012), is instructive in this regard. The question turned on whether Washington State Patrol records were shielded from disclosure because they were located in an electronic database that the Department of Transportation utilized for purposes that protected disclosure. The Supreme Court held: "WSP cannot shield otherwise disclosable accident reports under the guise of §409 by depositing them in a forbidden DOT electronic database."

The inquiry then is whether the documents were public records: they are public records. The documents were **owned** by the County: Finding 2.7 (unchallenged on appeal); the County *admits* in closing arguments that "it is a fact" that the County owns the documents, RP Vol 4, p. 604, ll 7-12; p. 605, ll 12-16. The County owned the documents, there is no dispute about it; therefore they are subject to the PRA.

The County **used** the documents. The County now argues that they

didn't know the documents existed (*see i.e.*: BR, 10, 12, 13, 31, 43-44);

but the record shows otherwise:

The April plans were saved as a .pdf document on April 13, 2012.¹⁹

(EX 2)

They were handed out at a meeting on April 23 or 24. (EX 1).

Mr. Eggleston requested them on April 26. (EX 9)

On May 7, 2012, the County used the April plans: they were sent to the contractor to price the wall on Eggleston's property. (EX 6)

On May 11, 2012, the County used the April plans to create a revision to the Eggleston rockery area detail. (EX 6)

May 16, 2012, , the County refused to disclose or produce the plans, sending a letter claiming the "Preliminary Draft" exception. (EX 10) (The County also failed to include a withholding index.)

Similarly the July Plans were used in determining to change the

¹⁹ There is no dispute that this is the date the plans were saved as .pdf, but they existed as a document prior to this time. The Act defines "public record" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, , or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). The Supreme Court has stated that it covers "nearly every conceivable government record related to the conduct of government." *O'Neill v City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010). Even electronic data about electronic data (metadata) is a public record. *See: Id.* The County admits that the plans existed in a computer and could have been printed at anytime (BR, 10; RP, Vol.1, p. 107-08). Printing a document that exists is not "creating" it.

rockeries on the Eggleston property (see EX 6, emails dated September 4, 2012).

The County's own emails demonstrate the use of the plans they now claim they didn't know existed, further demonstrating the County's dishonesty. (*See also* fn 6, *supra*.)

As demonstrated *supra*, the County **retained** the documents. There can be no doubt they were, and are, public records.

Thus, the County's argument must fail.

The conclusion is properly supported by Finding of Fact, by the record in this case, and by case law. This Court should affirm the trial court in this regard.

All the Findings of Fact and Conclusions of Law challenged by the County are properly supported; therefore this Court must affirm.

B. Additional Assignments of Error

If the County does not present any argument related to an assignment of error, this Court is not required to address it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Assignments of Error 1, 2, 3, 4, 17, 18, 19, and 20, do not have

argument directly related to them. This Court need not address them.

However, if the Court finds that the County's argument generally applies,

Mr. Eggleston responds as follows:

Assignment 1. The County challenges 3 Findings and 9 Conclusions, as noted above. As demonstrated *supra*, however, the Findings are supported by substantial evidence and the Conclusions are supported by fact and law . This general challenge is ineffective to put the balance of the Findings and Conclusions at issue. RAP 10.3(g). The County's assignment of error fails.

Assignment 2. The trial court entered a letter on June 11, 2015, to supplement the Findings and Conclusions entered that same day. The trial court relies on quotes from *Predisik v Spokane School Dist*, 182 Wn.2d 896, 902-03, 907 (2015) to give voice to his thoughts about "the competing interests of the Plaintiff and Asotin County in regards to necessary disclosures under the PDA [sic]".

The County does not specifically identify or object to any of the facts relied upon by the trial court in this letter; nor do they specifically identify or object to any of the legal conclusions.

Perhaps the County takes exception to the Court's statement:

Against the plaintiff's consistent and persistent efforts to obtain copies of the current diagrams, the County's refusal to provide the diagrams on the pretext that they were a work in progress is inexplicable. They had only to make request of its contractor, TD&H, to obtain a copy of the plans at any fixed point in time.

CP 492.

While the above quote is a mix of Findings of Fact and Conclusions of law it is all well supported in fact and law, as follows:

“Plaintiff's consistent and persistent efforts to obtain copies of the current diagrams”: There were 4 well documented requests for the plan (April 26, July 17, August 2, September 7) (EX 9, 11, 13, 18), plus at least two verbal requests (April 26, July 16) and another written request (EX 17) asking the County to at least provide the withholding indexes for the plans they had not produced. This statement by the Court is supported by substantial evidence.

“[T]he County's refusal to provide the diagrams on the pretext that they were a work in progress is inexplicable.” As demonstrated *supra*, the claim of preliminary draft is not supportable. Further, the County, after asserting the preliminary draft exemption on May 16, 2012, (EX10) then changed their story to claim that the plans didn't exist; this claim was proven false. (See *i.e.*: *supra* fn. 6, and p. 32-33; RP Vol 3, p 449, l. 14 -

p. 455, l. 15)

“They had only to make request of its contractor, TD&H, to obtain a copy of the plans at any fixed point in time.” CP540. Even the testimony of the County’s expert confirmed this point. RP Vol. 2; p. 335, ll 3-14; p. 336, ll. 17-25.

The County’s assignment of error is without merit.

Assignment 3. The County makes specific assignments of error to this letter ruling (assignments 17, 18, 19, and 20); those specifics will be addressed *infra*.

Assignment 4: No specific error is claimed or argued. No further response is required.

Assignment 17: *“The trial court erred in entering mitigating factor 5 in that there was a response and referenced negotiations.”*

As noted *supra*, the court found the County’s claims to be a “pretext” and “inexplicable.” CP492. As shown, this is supported by substantial evidence. The County claims that the court erred in stating, “The County also claimed that the request involved sensitive negotiation with a native tribe, although that excuse was not set out in any response nor was there any attempt to redact any document to reduce their

sensitivity.” CP539. The County argues in Assignment 17 that “there was a response and referenced negotiations.” This claim is without attribution to the record.

The County provided a solitary response claiming an exemption: EX10, dated May 16, 2012. In that response the County asserted the preliminary draft exception, not a sensitive negotiation exemption (which does not exist in the law). The County did not attempt to redact documents and provide them: they just withheld them (without providing a withholding log as required). The court’s findings are supported by substantial evidence.

The issue of alternative exemptions is addressed *infra*.

Assignment 18: “*The trial court erred in entering its aggravating circumstance 2.*”

The County claims they “complied with the procedural requirements of the PRA”. BR 17. But the record is filled with extensive violations (*see i.e.*: Appendix E: 4 violations of 5-day response; 13 silent withholdings; 13 violations of withholding log; 13 violations of adequate search.)

The County attempts to excuse these violations. BR 42 at footnote

29. The County states: “The court’s failure to perceive that a ‘vital government interest’ was involved and disclosure could have jeopardized the negotiating process undermines its finding of an aggravating factor of a lack of strict compliance” But, even if it were the trial court’s error (it’s not), and even if there was an applicable exemption (there isn’t), the County *could have* strictly complied with the *procedural* requirement without affecting an exemption. The County could have responded within 5 days each time; the County could have properly asserted an exemption and provided a withholding log; the County could have conducted an adequate search ... but it didn’t. The County’s claim of error is without merit.

Assignment 19: “*The trial court erred in entering its aggravating circumstance 4.*”

As noted above, the Court found in its June 11, 2015, letter that County’s refusal was based on a pretext and was inexplicable. The County now argues it made no “dishonest” response, the record shows otherwise, as follows:

As shown above, the April Plans were created and used by the County prior to asserting the “preliminary draft” exemption on May 16,

2012. *See i.e.*: fn6, above; “the County **used** the plans” p. 32-3, above.

In August, 2012, the County changed their position and claimed the plans didn’t exist. RP, Vol. 3, p. 449, ll. 14-16.

December 4, 2012, Mr. Bridges emailed TDH, tacitly acknowledging that he knew the April plans existed in April: “This past April 26, Rich Eggleston made a request for public documents ... Can you provide the county the other 28 sheets that you had [at] that time?” Mr. Noble provided them, again. EX 58.

One week later, December 11, 2012, the County asserts, “the first time this document turned to paper was when it was printed for Mr. Eggleston [meaning at a time generally contemporaneous with the letter].” EX 19.

A month later, January 8, 2013, despite what he had confirmed in his email exchange with Mr. Noble, Mr. Bridges swore under oath in a deposition (and again shortly thereafter on January 17, 2013, in an Affidavit) that the April plans did not exist in April and had never been created as a document until December, 2012. RP Vol. 3, p. 451, ll 12-23; p. 452, ll 12-22.

In April of 2015, Mr. Bridges testified, under oath, that the April

plans did not exist in April of 2012. *See: i.e.:* RP Vol. 1, p. 91, ll 18-22; Vol.3 p. 452, ll 23 - p. 453, l. 14.

The County was dishonest in their responses.

The County objects to the description of the relationship between the County and Mr. Eggleston as being “toxic” ... saying it is “generally unsupported” and does not apply to the appropriate timeframe. BR, 28.

But the record shows that the description of a “toxic” relationship was offered by a representative from Washington State Department of Archeology and Historic Preservation; stating that representatives of the County “were questioning [Mr. Eggleston’s] character” and “disparaging him personally” and accusing him of “looting the arc[h] site”. RP Vol. 1, p. 143. Even Mr. Bridges described the relationship in similar terms, calling it “contentious” and “certainly wasn’t cordial at times”. RP Vol 3, p. 533; *see also* fn4, *supra*.

The County objects to the court’s *Cedar Grove v Marysville*, 185 Wn.App 695, 354 P.3d 249 (Wash. App. Div. 1, 2015) balancing test, insisting that the court would have had to find TD&H a *de facto* public agency. BR 29-36. The court’s analysis is sound and based on the facts in the case as follows:

function: the contract with TD&H establishes this element. It states: “the AGENCY does not have sufficient staff to meet the required commitment and therefore deems it advisable and desirable to engage” TD&H. (BA, App. F, p. 3) It was contemplated that TD&H would be the functional equivalent of an employee. CP1028; BA App F, p. 3.

funding: The court accurately states that the funding was provided through the County. (*See i.e.:* BA, App.F, p.3)

control: TD&H was under the control of the County. This is set out in the contract (BA, App. F) as well as in practice (*see i.e.:* EX 42; 55; 56; 57; 58; BA App D p. 19-21; 22-23).

Origin: The court recognized this element mitigates against the finding, but the court further recognized it as a balancing test.

These findings are supported by substantial evidence, the court properly applied those facts and made the conclusion. The conclusion is supported by findings which are based on substantial evidence. The trial court must be affirmed.

Assignment 20: “*The trial court erred in entering its aggravating circumstance 5.*”

The trial court states its reluctance to find bad faith, while still

calling it willful negligence. The court reaffirms that the County's excuse to not provide the plans was a "pretext" and the County's actions are "inexplicable." CP540. The court's explanation shows that the "willful negligence" is based on the fact that the County could have had the plans at any fixed point in time, if only they asked. *Id.*

This is further supported by the County's flat refusal to provide a withholding log when they withheld documents, despite three requests for withholding logs from Eggleston's attorney. The County argues that "no withholding log would be necessary" since the request "only covered one document..." BR36 at fn25. But more detail is required.

When a record is withheld in its entirety, the withholding (or exemption) log *must* contain specific identifying information in addition to the cited exemption and brief explanation.

This additional information includes (1) the type of record being withheld (e.g., an "e-mail" or a "memo"); (2) the date of the record (e.g., the date it was created and transmitted); (3) the size of the record (e.g.; number of pages being withheld, number of e-mails in an e-mail string, or length of video); (4) the author of the record; and (5) recipients of the record (if known). PAWS II, 125 Wn.2d at 271 n.18; *Rental Hous. Ass'n*, 165 Wn.2d ay 539.

Public Records Act Deskbook, 2d Ed (2014), §6.7(5)(a). *See also: Rental Housing Ass'n of Puget Sound v City of Des Moines*, 165 Wn.2d 525, 538,

199 P.3d 393 (2009): “a valid claim of exemption under the PRA should include the sort of ‘identifying information’ a privilege log provides.”

The County’s refusal to produce the records, or to disclose the records, especially when combined with the demonstrated facts that the County was working behind the scenes to “circumvent” the right-of-way agreement with Eggleston (*see i.e.*: EX 6 (BA App.D, p.6), is only part of the evidence of bad faith. The *Deskbook* sets out that “when an agency fails to follow its own procedures, spends a minimal amount of time, produces only nonresponsive documents, ... that search is not only unreasonable but may also show bad faith. [citation omitted.]” *Id*, at §6.6(3)(a)(I).

The trial court’s finding of bad faith is generously understated and is supported by substantial evidence. The County’s assignment is without merit and the trial court must be affirmed in this regard.

C. Additional Exemptions

While it is true that, at the trial court level, an agency may advance exemptions that were not initially raised; that does not hold at the appellate level. *Sanders*, at 847; *PAWS II*, at 253. According to the

Deskbook:

“... even if the [agency’s] stated reasons for refusing disclosure were invalid, it could argue at the show cause hearing the information is deletable for other reasons.” [citing to *Cowles Publ’g Co*, at 683.] However, the agency must be prepared to come forward with evidence that supports the applicability of the previously uncited exemption at the trial level. *See Sargent v Seattle Police Dep’t*, 179 Wn.2d 376, 394-95, 314 P.3d 1093 (2013)[.]

Deskbook at §16.3(5) (2d Ed. 2014).

An exemption is narrowly construed because it impedes the search for truth. *Gendler*, at 260.

In the case at bar, the County asserted the preliminary draft exemption (RCW 42.56.280) when they sent the response on May 16, 2012. As discussed above, the trial court heard and considered this and properly rejected the claim.

The County now raises the archeology exemption (RCW 42.56.300(1)), a financial records exemption (RCW 42.56.270(1)); and a “sensitive negotiations” exemption (no statutory authority is cited). Being raised for the first time on appeal, these asserted exemptions fail.

Even if they had been properly raised, the asserted exemptions fail as follows:

Archeology. There is no dispute that the County ran into

archeologic resources a number of times, which lead to the shut down and modification of the project²⁰. There is no dispute that Mr. Eggleston was a §106 Consulting Party who was authorized to have access to, review and comment upon the plans and archeologic records. *See i.e.* RP Vol 4, p.586, ll 6-23. There is no dispute that there was only one page that had archeologic sites identified thereon; and that is the page that was given to Mr. Eggleston. *See i.e.:* RP Vol 4, p. 605, ll 1-6. There were no archeologic markers or otherwise on either the April Plans nor the July Plans.

RCW 42.56.300(1) protects “records, maps, or other information identifying the location of archeological sites in order to avoid the looting or depredation of such sites” Government agencies receiving a request from owners of the affected real property for these exempt records must refer the requestor to Department of Archeology and Historic Preservation. RCW 42.56.300(4). The *Deskbook* states:

The use of the modifier “in order to avoid looting or depredation” would arguably require an analysis that would be largely within the expertise and judgment of the agency applying the exemption”

²⁰ The existence of these archeologic sites was the reason behind Mr. Eggleston’s 9 requests for the proposal as he was trying to warn the County away from the sensitive areas.

Deskbook, at §12.7(4).

Mr. Eggleston had warned the County of the site for many years (going back to prior to Request 1, in 2004). Mr. Eggleston was authorized to see and comment on any records dealing with archeology. The County gave him the solitary document that showed where the remains were. The County did not refer him to DAHP. The exemption does not apply in this case. The County's claim must fail.

Financial Records (the "valuable formulae" exemption. RCW 42.56.270(1), is related to the trade secrets exemption. Id, at §13.2(2). This exemption was discussed in PAWS II where the Supreme Court explained "[t]he clear purpose of the exemption is to prevent private persons from using the Act to appropriate potentially valuable intellectual property for private gain." PAWS II, at 254-55. It does not apply to the facts herein.

The requested plans were not "valuable intellectual property". Even if they were, they could not have been used to damage the County, nor for the private gain of Mr. Eggleston.

Instead, Mr. Eggleston sold a portion of his land to the County. The sale included a duty of the County to build rockeries on or adjacent to

his land to retain slopes that were created by the project. *See i.e.:* RP Vol 2, p 245-46. He had a right to ensure that the County lived up to their contractual obligation (which they did not). RP Vol 3, p. 551, ll 11-15.

The County claims that Mr. Eggleston's efforts to see the plans and learn what the County was planning for his land was an attempt to cause loss to the public and make a private gain. *See i.e.:* BR, 18. The claim doesn't stand scrutiny. Mr. Eggleston had the right to hold the County to their contract (CP490): that does not create a public loss. Had he succeeded, it may have stopped the County from damaging his property, which is neither a public loss nor a private gain. The County's argument is without merit.

Sensitive negotiations. The County has not asserted a recognized exemption. Even if it were; it was not proven. The County has not met their substantial burden and their claim must fail.

D. Issues Relating to Assignments of Error on Cross Review

1) Assignments of Error 1-20 were not error, do not support this issue, and it fails.

As has been shown, the County owned, used and retained the documents; they were properly the subject of a PRA request and should

have been both disclosed and produced. The County failed. The trial court should be affirmed in this regard.

2) Assignments of Error 1-20 were not error, do not support this issue, and it fails.

Prior to trial and through the two trials, the County asserted only the Preliminary Draft exemption, which does not apply. Subsequently, the County now asserts additional exemptions which also fail. The trial court should be affirmed in this regard.

3) Assignments of Error 18-20 were not error, do not support this issue, and it fails.

The three challenged conclusions were supported by substantial evidence and the law; therefore, the trial court did must be affirmed in this regard.

V. CONCLUSION

This case is about a County and the lengths it will go to in order to prevent a citizen from getting simple records dealing with a County road project. The County has been dishonest, has slandered the citizen, planned and executed a breach of contract, and so on. They now come to this Court pleading poverty as though it would excuse their calculated bad

behavior. For their own reasons, the County chose to not provide the requested documents. The record against the County is solid, legally and factually.

The County's Cross appeal is not well supported: the challenged Findings are supported by substantial evidence; the challenged Conclusions are supported by Findings, facts and the law; and the other claimed issues are without merit. The County's cross appeal should be denied, and the trial court be affirmed on these issues.

Respectfully submitted this 24th day of March, 2017.

Law Offices of Todd S. Richardson, PLLC



Todd S. Richardson WSBA 30237
Attorney for Mr. Eggleston

Certificate of Service

I HEREBY CERTIFY that on the 24 day of March, 2017, I caused a true and correct copy of this Appellant's Reply Brief / Cross Response to be filed with Court of Appeals, Division 3 via JIS-Link, and that through their email service be served on the following:

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY WALLA WALLA**

RICHARD EGGLESTON, an
individual,

PLAINTIFF

vs.

ASOTIN COUNTY, a public agency;
and ASOTIN COUNTY PUBLIC
WORKS DEPARTMENT, a public
agency,

DEFENDANTS

No. 12-2-00459-6

CLOSING ARGUMENTS AND
MEMORANDUM OF LAW

At the conclusion of trial instead of oral closing argument, the Court instructed counsel to provide written closing argument / memorandum of law, and asked counsel to address certain specific questions, and to submit written Findings of Fact and Conclusions of Law for consideration by the Court. The Findings of Fact and

CLOSING ARGUMENTS AND
MEMORANDUM OF LAW

1

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Conclusions of Law are submitted concurrent herewith, though in a separate document.

The questions the undersigned noted that the Court asked to be addressed are:

- 1) The difference between “Preliminary” in the context of engineering drawings and in the context of the Public Records Act, and any caselaw relating thereto.
- 2) Relating to exemptions, the Court specifically referenced Exhibit 10. What is the caselaw on claimed exemption and the duty to redact? Regarding RCW 42.56.210, does it apply, and if so how.

These questions are addressed at the end of this document. The undersigned has attempted to format this document for ease of reference and speed of locating information. The structure of the document is as follows:

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I. SUMMARY

This is a Public Records Act (PRA) case dealing with five requests made on April 26, 2012; July 17, 2012; August 2, 2012; August 24, 2012; and September 7, 2012. The structure for analysis of a PRA was set out in the Trial Memorandum, and will be generally followed herein. The PRA is “a strongly worded mandate for broad disclosure of public records.” (*West v Thurston County (West II)*, 168 Wn. App. 162, 182, 275 P.3d 1200 (2012).) It contains a “thrice-repeated” mandate for interpreting the Act in favor of full-disclosure (*see i.e.: West v Port of Olympia*, 146 Wn. App. 108, 116 n.10, 192 P.3d 926 (2008), *review denied*, 165 Wn.2d 1050 (2009).)

1. Request.

Requests were made on April 26, 2012; July 17, 2012; August 2, 2012; August 24, 2012; and September 7, 2012.

Jim Bridges testified that he understood each to be a request.

This is discussed at greater length in Section 1, of the Discussion below.

1.1 Identifiable document.

April 26, 2012: “I would like a copy of all the current sheets. Jim had offered an electronic copy (.pdf) and that would be fine.”

July 17, 2012: “I had asked for the current project plans for the 10 mile project. Because this is a current active project, you originally indicated you would provide the documents within 5 days. Then upon calling attention to our outstanding PRR legal action (which, other than the parties involved, is unrelated to this request) you indicated you would first run the request by Jane Risley.”

August 2, 2012: After setting out the prior two requests and the failure to properly respond, it states: “While we appreciate the response which was given, it is incomplete and also lacked the withholding log which would be necessary if the County intended to provide less than the full document. Realizing that this is likely just an oversight on the part of the County, I felt it best to raise this to your attention so that [sic] may be properly and promptly corrected.” This request is simply seeking the two documents previously requested, or (alternatively) the withholding logs that should have been given if the County intended not to produce the full document.

August 24, 2012: “I don’t mean to unnecessarily disrupt your schedule, but in reviewing your letter it came to my attention that we are still missing the Withholding Index for the documents you claim are exempt from disclosure pursuant to RCW 42.56.280. A prompt and complete Withholding Index would be very much appreciated.”

September 7, 2012: “Let me be perfectly clear here. The request is NOT for the Submittal to the Nez Perce Tribe (date 5-29 ... which obviously wasn’t done for the April 26, 2012 meeting). The request is for the complete set of plans as they existed on the dates of the request.”

The requests and the law pertaining thereto are discussed at greater length in Section 1.1 of the Discussion below.

2. Agency Duties.

Once the request is made, the duties fall on the agency to appropriately

respond. There are a variety of ways an agency may violate the PRA, some of which are detailed below.

2.1 Five Day Response.

The record at trial establishes the Defendants' actions as follows:

April 26, 2012: Five day letter requesting more time was timely sent.

July 17, 2012: Response sent within 5 days; no clarification requested. Exhibit 12.

Aug. 2, 2012: Response sent within 5 business days; no clarification requested. Exhibit 14.

Aug. 24, 2012: No 5-day response sent; no clarification requested. April plans provided on December 10, 2012. Testimony of Jim Bridges and Rich Eggleston.

Sept. 7, 2012: No 5-day response sent; no clarification requested. April plans provided on December 10, 2012. Testimony of Jim Bridges and Rich Eggleston.

This issue is discussed in greater detail in Section 2.1 of the Discussion below.

2.2 Adequate Search.

The County has a duty to perform an adequate search. An adequate search does not require the agency to search in every conceivable place, but it does expressly require a search of every place the document may reasonably be found. *Neighborhood Alliance of Spokane County v County of Spokane*, 172, Wn. 2d 702, 261 P.3d 119 (2011).

At trial Jim Bridges testified that he knew that if there were any current plans, the County's contracted engineer, TD&H, would have them. Despite that, Mr. Bridges testified that the extent of his searches were as follows:

April 26, 2012: He asked Craig Miller if there were any current plans in their office.

July 17, 2012: He asked the County's attorney Jane Risley how he should respond. (He testified that he spoke with Vivian Bly, about the request from the 16th, but did not ask her anything about the request from the 17th.)

Aug. 2, 2012: None

Aug. 24, 2012: None

Sept. 7, 2012: None

Mr. Bridges repeatedly confirmed that he did not ask TD&H for copies of the current plans for the requests, and that he did not ask TD&H whether there were current plans that existed.

This section is discussed at greater length at Section 2.2 of the Discussion below.

2.3 Disclosure and Production

Every public record is subject to disclosure, even if there is an exemption excusing production. *Neighborhood Alliance*, at 721.

In this case, regarding the April 26, 2012, request, the Defendants did not disclose any records; they did claim the records were exempt from production.

Exhibit 10; testimony of Jim Bridges; testimony of Rich Eggleston. At trial, when asked what records were claimed to be exempt in the May 16, 2012, response (Exhibit 10), Mr. Bridges could only say “the current drawing sheets.” He could not identify them by date, creator, number of pages or any other way. This is the essence of the withholding log, to reasonably identify the document the agency claims is exempt so it may be properly and fully reviewed by a Court. Any time a document is withheld, either *in toto* or partially, a withholding log is to be provided. *Fisher Broadcasting; PAWS II; Rental Housing Association v of Puget Sound v City of Des Moines*, 165 Wn.2d 525, 539, 199 P.3d 393 (2009). Failure to provide such a withholding log is a silent withholding. *Prog. Animal Welfare Society v. Univ. of Wash (PAWS II)*, 125 Wn. 2d 243, 270, 884 P.2d 592 (1994). A silent withholding is a violation of the PRA. *PAWS II*.

Applying the disclosure and silent withholding portions of the rule we see the following:

- April 26, 2012:** No document disclosed; no withholding log.
- July 17, 2012:** No document disclosed; no withholding log.
- Aug. 2, 2012:** No document disclosed; no withholding log.
- Aug. 24, 2012:** No document disclosed; no withholding log.
- Sept. 7, 2012:** No document disclosed; no withholding log.

If an agency determines that they believe a document is exempt from production, the burden is on the agency to prove that the secrecy is lawful. *Fisher Broadcasting*.

The Defendants herein only asserted one claimed exemption, and offered no proof of any other. It is error for the Court to attempt to find other possible exemptions to assert on behalf of the Defendants. *Sargent v Seattle Police Dep't*, 179 Wn.2d 376, 394-95, 314 P.13d 1093 (2013). The Defendants claimed, though failed to prove the elements of, the “deliberative process” exemption: RCW 42.56.280. In order for the Defendants to prove this exemption they must prove each of the four elements, and they failed to do so. Interestingly, the exemption was only claimed in response to the April 26, 2012 request; seven (7) months later, and for the first time, Defendants asserted the document did not exist and attempted to argue that at trial. Such a claim is a) inconsistent with the claim of an exemption, and (more importantly) b) inconsistent with the unchallenged testimony that the April plans existed as a .pdf document since April 13, 2012, 13 days before the request.

Additionally, over and again, Jim Bridges, Randy Noble, and even Mr. Ayers, testified and agreed that the drawings are merely graphical representations of facts and data. When pressed, Mr. Bridges could not point to a single opinion or recommendation in the April plans.

This issue will be discussed at greater length in Section 2.3 of the Discussion below.

2.4 Public Record.

The question of whether these are public records was raised by the Defendants. The proper analysis of this issue comes AFTER determining whether there was an adequate search, and as part of the disclosure and production evaluation.

In this case, it is to ignore or deny undisputed facts to suggest that the records are not public records. The records are owned by the County. Exhibit 23, testimony of Randy Noble. The records were used by the County. (Exhibits 1, 5, 6, testimony of Randy Noble, testimony of Rich Eggleston, testimony of Matt Albrecht). The documents were prepared by the County. (Testimony of Randy Noble, testimony of Matt Albrecht.) The documents were retained by the County (testimony of Randy Noble, testimony of Matt Albrecht.)

This issue will be discussed at greater length in Section 2.4 of the Discussion below.

2.5 Violations.

As can be seen on the chart on the following page, there are 22 violations noted. Additional violations shown during trial include failure to train the staff on the PRA.

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Request Date	5 day Response ¹	Adequate Search Failure ²	Silent Withholding ³	Failure to Produce Document ⁴	No Withholding ⁵ or Wrong Exemption ⁶
April 26, 2012		X	X	12-10-12	X
July 17, 2012		X	X	X	X
August 2, 2012		X	X	- April Plans in December - No July Plans	X
August 24, 2012	on-going	?			
September 7, 2012	on-going	X	X	- April Plans in December - No July Plans	X

¹ RCW 42.56.520

² *Neighborhood Alliance of Spokane County v County of Spokane*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011)

³ *Rental Housing Association v City of Des Moines*, 165 Wn.2d 525, 537, 199 P.3d 393 (2009)
See also: *PAWS II*, 125 Wn. 2d 243, 270, 884 P.2d 592 (1994)

⁴ RCW 42.56.070, *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715,722, 261 P.3d 119 (2011)

⁵ *Rental Housing Association v City of Des Moines*, 165 Wn.2d 525, 538-541, 199 P.3d 393 (2009)

⁶ RCW 42.56.530, *Sanders v State*, 169 Wn.2d 827, 845-848, 240 P.3d 120 (Wash. 2010), *Neighborhood Alliance*, at 715

II. DISCUSSION

Background.

Trial in this matter was held in Asotin County on April 1 - 2, 2015. Witnesses who testified during the Plaintiff's case-in-chief were: Jim Bridges, Asotin County Engineer and Public Works Director; Matthew Sterner, Washington State Department of Archeology and Historic Preservation (DAHP); Randy Noble, Construction Manager and Project Manager for TD&H (the County's contracted consulting engineers on the Ten Mile project); Matthew Albrecht, attorney, formerly with WSDOT, expert witness for Plaintiff; Richard Eggleston, plaintiff. Plaintiff also presented Exhibits 1-19, and 23 - 25.

Witnesses testifying in the Defendant's case-in-chief were: Jim Bridges; James Ayers, County Road and Bridge (CRAB); Craig Miller, project manager for Asotin County Public Works.

Attached hereto as Attachment A is a 7 page document which are copies of the flip-chart notes made by the undersigned during questioning of the witnesses. These flip-chart notes are not evidence, but were made contemporaneously with the testimony to aid in recall of certain important portions of testimony. They will be referenced in the discussion below.

1. Request.

For the PRA process to begin, there must be a request. There are not limits on the number of requests a person may make. *Zink v City of Mesa, (Zink I)*, 140 Wn.

App. 328, 340, 166 P.3d 738 (2007). Each request is a stand alone request since public record requests are not on-going requests. *Sargent v Seattle Police Dep't*, 167 Wn. App. 1, 260 P.2d 1006 (2006), *aff'd in part, rev'd in part on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013). *See also*: Testimony of Matt Albrecht.

No special language must be used to make a request, and no special form must be used. *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000); *Beal v City of Seattle*, 150 Wn.App. 865, 872-73, 209 P.3d 872 (2009)

The requests were testified to at length and are available for review as Exhibits 9, 11, 13, 17, and 18. The requests herein are each written documents (there was testimony regarding a verbal request made July 16, 2012, but it is not part of this action). Each request seeks a document or documents.

Though the Defendants chose, at trial but at no time prior to trial, to question whether these requests are, in fact, requests; any fair or objective reading of the requests reveals they are just that: requests. When we consider the mandates of the PRA: to construe it broadly in favor of disclosure; requiring agency's to provide fullest assistance to requestors; to seek clarification if there is confusion or ambiguity; etc., then we see clearly that the Defendants' constrained reading is contrary to law and policy and must be rejected as flawed.

There were five separate requests involved in this action.

1.2 An Identifiable Record.

At trial, for the first time, Defendants attempted to profess confusion about

what was being requested by the five (5) requests. Interestingly, upon questioning from the undersigned, the confusion seemed to melt away. Jim Bridges, Matt Albrecht, and Rich Eggleston each provided testimony as to what the requests were seeking, and each were able to correctly identify what document(s) was being sought in each request.

The requirement of seeking an “identifiable record”, rather than seeking a record by a specific name, is derived from two provisions in the PRA: 42.56.080 and 42.56.550(1). In section .080, agencies are required to respond to requests for “identifiable” records ... that is records that are capable of being identified. Subsection .550(1) allows requestors to seek a “class of records.”

When these statutory sections are read in harmony with the mandates of the PRA, we see that an agency may not pretend to not understand what document is being requested, and thus avoid a proper answer. Thus we see that a request for the “current plans” or “current drawing sheets” may be for a specific document (though a specific date or designation is unknown to the requestor); or those terms may be for a “class of records”, which together fully respond to the request. It is incumbent upon the agency to seek to understand, to provide the fullest assistance, and to seek clarification if there is confusion or ambiguity. Sadly, as demonstrated at trial, the Defendants failed in this.

Here is a summary of the five requests⁷:

⁷ These are excerpts only. The Exhibit number is referenced for ease of review the entire request. It is the undersigned’s desire to avoid the confusion we saw at trial when defense counsel mistakenly relied upon a synopsis of requests that was included in a prior pleading.

April 26, 2012 (Exhibit 9)

I am forwarding this email as a public record request for the current drawing sheets of the Ten Mile project.

I have a copy (provided by Craig) of sheet 1 of 29 sheets dated 4/20/2012. I would like a copy of all of the current sheets. Jim had offered an electronic version (.pdf) and that would be fine.

July 17, 2012 (Exhibit 11)

I am following up on my public records request from last evenings BOCC meeting. I had asked for the current project plans for the 10 mile project. Because this is a current active project, you originally indicated you would provide the documents within 5 days. Then calling attention to our outstanding PRR legal action (which, other than the parties involved, is unrelated to this request) you indicated you would first run the request by Jane Risley. Please let me know when I can expect the documentation. My preference would be an electronic copy with .pdf files.

August 2, 2012 (Exhibit 13)

In your letter of June 20, 2012, you offered to assist in ensuring that Mr. Eggleston's PRA requests were properly addressed; it is to that end I now write.

... [the April and July requests and responses are summarized]

While we appreciate the response which was given, it is incomplete and also lacked the withholding log which would be necessary if the County intended to provided [sic] less than the full document. Realizing that this is likely just an oversight on the part of the County, I felt it best to raise this to your attention so that may be properly and promptly corrected.

August 24, 2012 (Exhibit 17)

I don't mean to unnecessarily disrupt your schedule, but in reviewing your letter it came to my attention that we are still missing the

Withholding Index for the documents you claim are exempt from disclosure pursuant to RCW 42.56.280. A prompt and complete Withholding Index would be very much appreciated.

September 7, 2012 (Exhibit 18)

[A review of the history of the April, July and August requests, responses and efforts to obtain proper responses is summarized]

I am tired of the games, and therefore I hereby notify you that you are in breach of the Public Records Act as to both of Mr. Eggleston's recent requests (both the April 26, 2012, and the July 17, 2012 requests). If I do not have a proper disclosure (not a letter asking for more time, the opportunity provided for that by statute has long since expired) by September 14, 2012, I will be forced to take additional action.

Let me be perfectly clear here. The request is NOT for the Submittal to the Nez Perce Tribe (date 5-29 ... which obviously wasn't done for the April 26, 2012, meeting). The request is for the complete set of plans as they existed on the dates of the request.

[separate unanswered requests are addressed]

There can be no doubt about what record(s) were being sought:

April 26, 2012: "the current drawing sheets of the Ten Mile project"

July 17, 2012: "the current project plans for the 10 mile project."

Aug. 2, 2012: either the complete documents or the withholding logs⁸

Aug. 24, 2012: A withholding index for the documents claimed to be exempt

Sept. 7, 2012: "the complete set of plans as they existed on the dates of the

⁸ It is interesting to note that the least precise and clear of the requests is the August 2, 2012 request, and the Defendants (at trial) tried to claim they did not understand it as a request; however, they did provide a response within five-days which spoke to (though did not properly respond to) the requests as they understood it. This letter (Exhibit 14) belies the claims at trial that they did not know nor could have known what was being requested.

request” (April and July)

Each request is for a document or documents or sets of documents that are capable of being identified. If there was any confusion about what was being requested, the agency (the Defendants) should have sought clarification. Rcw 42.56.520; *see also: Levy v Snohomish County*, 167 Wn.App. 94, 98-99, 22 P.3d 874 (2012).

2. Agency Duties

Upon receiving a request for an identifiable record, the agency has duties imposed upon it. RCW 42.56.520 requires that agencies “promptly” respond to requests “within five business days”. This section further sets out the responses that are acceptable within five business days: 1) provide the record; 2) provide an internet address and link on the agency’s web site to the specific records requested; 3) acknowledging the request and provide a reasonable estimate of the time needed to respond; or 4) deny the request.

Because of the 4 possible responses, it is immaterial whether the 5-day response comes first or whether an adequate search comes first; either way, they are both requirements imposed on the agency.

The agency further has duties of disclosure and production, which are separate duties. *Neighborhood Alliance v. Spokane County*. A record may be disclosed but not produced if a proper exemption is claimed; the document would be disclosed in a proper withholding log or index. In such a situation, the agency would also have

the burden of asserting (and later proving at trial) a proper exemption.

The Court specifically requested briefing on RCW 42.56.210 as an exemption, this will be discussed in section 2.3.1 below.

We will then discuss what a public record is, and how that was proven at trial and then the violations committed will be reviewed.

2.1 Five (5) Day Response.

At this point in the analysis, the County has received a request for an identifiable record (indeed, five requests for identifiable records have been shown). This leads to the statutory imposition of duties on the Defendants. The Defendants must respond within 5 days. The 5-day letter must do one of a limited number of things:

- 1) Provide the record;
- 2) provide the internet address and link on the agency's web site to the specific records requested;
- 3) acknowledge that the agency has received the request and provide a reasonable estimate of time the agency will need to respond;
- 4) deny the request; or
- 5) seek clarification of the request

See: RCW 42.56.520. Responses 1-4 are set out as numbered within the statutory section; number 5 (seeking clarification) is authorized separately in that section.

If an agency fails to respond within those five business days, it results in an

actionable violation. *West v State Dep't of Natural Resources*, 163 Wn. App. 235, 243, 258 P.3d 78 (2011), *review denied*, 173 Wn.2d 1020 (2012).

This initial response is a simple, bright-line test. In the case before the Court, the Defendants complied with some and violated some, as follows:

April 26, 2012 request: as stated and stipulated at trial, Defendants did answer within 5 business days. The response was not part of the record, but there is no dispute that the initial letter stating they needed more time was sent within 5 days.

July 17, 2012 request: the response was made July 19, 2012. It did not provide the requested records, but that will be addressed under Adequate Search; the initial response was timely. (Exhibit 12.)

August 2, 2012 request: response was timely. (Exhibit 14.)

August 28, 2012 request: no response was made. Testimony from Jim Bridges confirmed that he believed it was partially answered when the April plans were provided on December 10, 2012. Testimony of Rich Eggleston confirmed Mr. Bridges' testimony that no 5-day letter was received.

September 7, 2012 request: no initial response was made by Defendants. Testimony from Jim Bridges confirmed that he believed it was partially answered when the April plans were provided on December 10, 2012. Testimony of Rich Eggleston confirmed Mr. Bridges' testimony that no 5-day letter was received and the April plans were first produced by Defendants on December 10, 2012. The July plans

have yet to be provided by Defendants⁹.

The testimony and exhibits are unchallenged: Defendants failed to make the statutorily required initial response on two of the five requests.

2.2 Adequate Search

The Public Records Act is a very broad act that covers “nearly every conceivable government record related to the conduct of government.” *Oneill v City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010). The PRA applies to “any writing containing information relating to the conduct of government ... regardless of physical form or characteristics.” RCW 42.56.010(3).

A writing is defined broadly as well:

handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.010(4).

It is this extremely broad definition of writing and public record that gives the PRA such wonderful scope. Agencies cannot simply limit their search to documents

⁹ The July Plans were obtained through a deposition of Randy Noble on January 18, 2013. However, this is insufficient to stop the penalty days.

on their desks, in their offices, or which may have been put to paper. Case law instructs us that electronic data is a public record ... even when it is only electronic data about electronic data, also called metadata. *O'Neill v City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010).

With this wonderfully inclusive definition of writing and public record, we also find that documents not retained by an agency can still be a public record. *Mechling v City of Monroe*, 152 Wn.App. 830, 222 P.3d 808 (2009), *review denied*, 169 Wn.2d 1007 (2010) (emails from home computers that referenced city business were public records); *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999) (determining a technical document which was reviewed, evaluated and referred to by a public agency, though never possessed, owned or kept by the agency to be a public record). The lesson is that public records may be stored away from the agency or agency's own computer systems.

The analysis of an adequate search does not turn on whether a document is produced; rather, it analyzes the process used to look for the requested record. The *Neighborhood Alliance* court stated it this way:

The search should not be limited to one or more places if there are additional sources for the information requested. [citation omitted.] Indeed, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested. [citations omitted.] This is not to say, of course, that an agency must search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found.

Neighborhood Alliance, at 720, 261 P.3d at 128.

The search must comply with the mandates of the Act, to provide the fullest assistance possible to the requestor; it must be a sincere and adequate search. *Fisher Broadcasting*, at 522. Clearly, the search need not be “perfect” ... but adequate is no low threshold either.

Complying with a proper search is of sufficient importance that the Supreme Court has directed that it is the agency’s burden, to prove “**beyond a material doubt**” that the search was adequate. *Neighborhood Alliance*, at 721.

Failure to conduct an adequate search is the equivalent of a denial.

“The failure to perform an adequate search precludes an adequate response and production. The PRA " treats a failure to properly respond as a denial." *Soter v. Cowles Publ'g Co.*, 162 Wash.2d 716, 750, 174 P.3d 60 (2007) (citing RCW 42.56.550(2), (4) (formerly RCW 42.17.340)).

Id.

In the case before the Court, the evidence is overwhelming that the search simply was not adequate. Further, the County produced almost nothing to support a claim that the search was adequate; the testimony at trial regarding the search was adduced by the Plaintiff. It would be a mistake to state the County produced nothing about the search for they repeatedly established that they did not, at any time, ever, ask TD&H whether the record existed; that they did not, ever, ask TD&H to give to the County the requested plans. Thus, it would be a mistake to say the County did not produce anything about the search, they did help establish the inadequacy of the search.

April 26, 2012 request: Jim Bridges testified that he asked Craig Miller if they

had any document that was responsive to the request. He testified (repeatedly) that he did NOT ask TD&H for the record, and did not ask TD&H whether such a record existed. Despite claiming an exemption (which indicates the document exists), Mr. Bridges testified that in December, 2012, and from that time forward, it was the County's position that the document did not exist. He further testified that he knew that any current drawings would be on a computer at TD&H, but despite that, he did not ask whether such a document existed. Mr. Bridges testified that requesting copies of the current plans from TD&H would have been a waste of taxpayer money; however, this argument/claim is specious. The PRA specifically allows the agency to charge the "actual per page cost" for records produced (RCW 42.56.070(7)). Therefore, this claim (which was raised for the first time at trial) is wholly without merit; but, it does highlight the fact that the records were paid for by public funds, a point that will be raised in greater detail *infra*.

Mr. Bridges further confirmed that there was no search log created to document what search was done, nor was there a withholding log. Attachment A, page 4 are the flip chart notes made during Mr. Bridges' testimony.

Randy Noble, who was the project manager for TD&H at the time, testified that the drawings all resided on computers at TD&H. That they could be printed at anytime. Further, that a set of plans that were current as of April 26, 2012, existed as a .pdf and were available for the printing at any time thereafter. That TD&H was

not asked for the current plans in response to the April 26, 2012, request. Exhibit 7¹⁰ further confirmed that Asotin County did not ask TD&H for the current plans in response to the April 26, 2012, request.

The County did not meet their burden of proving beyond material doubt that the search was adequate, rather, the testimony proved the inadequacy of the search.

July 17, 2012 request: Jim Bridges testified that for the July 16, 2012 verbal request he spoke with Vivian Bly, the clerk for the Board of County Commissioners, about what documents may satisfy that request. BUT, his search for records responsive to the July 17, 2012 request (which he testified was for “current project plans”) consisted of speaking to the County’s attorney, Jane Risley. Again, he testified that he knew the plans were residing on TD&H computers and that he did not ask TD&H if there were a current set of plans, nor did he ask TD&H to provide him with the current project plans as of July 17, 2012. His testimony also reaffirmed that there was no search log and no withholding log for this request.

Mr. Randy Noble testified that the plans that were current as of July 17, 2012, were in existence as a .pdf and were available for printing at any time thereafter. He

¹⁰ Exhibit 7 is a document initially produced for Randy Noble’s Deposition. Exhibit 5 is a copy of the Subpoena Duces Tecum for that deposition, item number 6 in that required Mr. Noble to bring “Copies of all communication to include email, notes, memoranda, letters and any other documents memorializing communication between Asotin County and/or someone on their behalf or one of their agencies and TD&H regarding public records requests made by Richard Eggleston.” Exhibit 7 are the cover sheets of the documents so produced, and reflect numerous times that Asotin County contacted TD&H to obtain documents responsive to Eggleston PRA requests; notably the most recent in time is from 2010. This demonstrates a) Asotin County knew where the documents would be; b) Asotin County knew they could ask for them; and c) Asotin County chose not to request them from TD&H.

testified (and Exhibit 7 confirms, along with the testimony of Mr. Bridges) that TD&H was not asked about the existence of a current set of plans as of July 17, 2012.

Again, the County did not carry their burden to demonstrate the adequacy of the search; rather, the testimony and the exhibits demonstrate the lack of adequate search.

August 2, 2012 request: Mr. Bridges testified that Exhibit 13 was a true and correct copy of the request, and that their response was Exhibit 14. He testified there was no withholding log produced or identified, no plans were produced or identified, and no documents of any type were produced.

There was no testimony to establish any type of sufficient search.

August 24, 2012 request: Mr. Bridges testified that the request was for a withholding index (see: Attachment A, page 7). He offered no testimony to establish an adequate search. He was asked if he ever saw a withholding log, or heard of a withholding log, or made a withholding log; but there wasn't so much as a single question as to whether he asked or looked for one.

Lacking any testimony or evidence of any kind to meet their burden, the County failed in this regard as well.

September 7, 2012 request: Mr. Bridges testified that this request was for a complete set of plans from April 26, 2012, and for the July Plans. He testified that he did not seek any clarification. He testified (as was confirmed by Mr. Noble and Exhibit 7), that he did not ask TD&H whether the responsive documents existed, nor did he ask TD&H to provide the responsive documents, but he did know that any

responsive exhibits would be at TD&H because it is his habit to not keep sets of plans in his office: by not keeping them he is able to avoid confusion or mistake by looking at the wrong plans if he is on the phone.

Again, the testimony and the evidence all demonstrate an abject failure to search.

One of the maddening concepts in this case is that the County knew where the responsive records were, but chose not to look there! This willful abuse of the duty to search will be an issue during the penalty phase.

The Supreme Court has instructed that “[a]n adequate response to the initial PRA request where records are not disclosed should explain, at least in general terms, the places searched.” *Neighborhood Alliance*, at 722.

Further, whether the current plans had been saved as a document on or by those dates is not dispositive. There can be no question that the Defendants knew that the plans resided in TD&H computers. ALL public records, regardless of physical form, and without regard to how they are created, are disclosable (whether they must be produced in addition to being disclosed will be discussed *infra*). Even if a “document” “exists” in a database designed for another purpose, if it is even partially responsive, it must be produced. *Fisher Broadcasting-Seattle TV LLC v City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014). The Defendants knew that an electronic version of the records existed at TD&H, yet they did not so much as ask about it. The burden is on the agency to prove beyond a material doubt that their search was adequate. *Neighborhood Alliance*, at 721.

In sum, we see five requests, and the County chose not to perform a search, or chose not to adduce any evidence of searches (in fact, they specifically adduced evidence of the LACK of a search). These are five violations of the Public Records Act.

2.3 Disclosure, production and exemptions.

Failure to disclose a record results in a silent withholding.

Unless the document is expressly exempt from production, failure to produce the record is a wrongful denial.

Exemptions must be correctly asserted or they result in an wrongful denial and must be accompanied by a withholding log or they result in a silent withholding..

Disclosure and production are separate requirements, and they are intertwined with exemptions. When an adequate search results in a record being located, the record is to be disclosed and either produced or an exemption claimed. In the event that the record is produced, its production will also meet the disclosure requirements. However, if the agency asserts an exemption as to the entire document, then a proper withholding log must disclose the document.

Every public record is subject to disclosure in response to Public Records request. The Supreme Court established this standard in *Neighborhood Alliance*, stating:

Moreover, records are never exempt from disclosure, only production, so an adequate search is required in order to properly disclose

responsive documents. *See Sanders*, 169 Wash.2d at 836, 240 P.3d 120.

Id. at 721.

If a document is not *disclosed*, it results in a silent withholding. The Supreme Court specifically condemned silent withholdings in *PAWS II*:

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. See *Fisons*, 122 Wash.2d at 350-55, 858 P.2d 1054. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required *de novo* review is vitiated.

PAWS II, at 270.

The failure to disclose a document is a silent withholding. Both the April and July Plans were silently withheld from Mr. Eggleston as neither were disclosed, despite both being in existence and available. Upon repeated questioning by his attorney, Mr. Bridges adamantly and strenuously repeated that at no time did he create a withholding log for any of the 5 requests: he did not make one; he did not see one; he did not hear of one; he is absolutely sure none ever existed.

In questioning on cross, when asked to identify the document that he claimed was exempt from production in his May 16, 2012, response (Exhibit 10), Mr. Bridges

could not identify what document was being withheld. The withholding was so silent that the agency itself could not identify what they withheld; it is precisely what the Supreme Court said is improper.

Unless the document is properly exempt from production, it must be produced. The PRA is abundantly clear on this and the case law establishes this beyond question. The duty to produce an identifiable document that is not exempt is the genesis of the direction that the PRA is to be broadly interpreted and the exemptions narrowly construed.

Exemptions. As noted throughout the statute itself and virtually every PRA case, exemptions are to be narrowly construed. Exemptions are “precise,” “highly specific, limited and carefully crafted.” *Prog. Animal Welfare Society v. Univ. of Wash (PAWS II)*, 125 Wn. 2d 243, 258 n.6, 884 P.2d 592 (1994).

ONLY that portion of a record which is covered by the precise exemption is to be withheld. (RCW 42.56.210(1); “the exemptions of this chapter are inapplicable to the extent that information ... can be deleted from the specific records sought.”)

In the case before the Court, the County claimed the deliberative process exemption found in 42.56.280, as the basis for not disclosing the April plans in response to the April 26, 2012 request. The “deliberative process exemption” is a narrow exemption; the Supreme Court in *PAWS II* noted that they had previously “specifically rejected the contention that [the deliberative process] exemption applies to all documents in which opinions are expressed regardless of whether the opinions pertain to the formulation of policy.” *Id*, at 256 (citing *Hearst Corp., v. Hoppe*, 90

Wn.2d 123, 132-33, 580 P.2d 246 (1978)). Later in *Cowles Publishing Co. V City of Spokane*, 69 Wn.App. 678, 849 P.2d 1271, *review denied*, 122 Wn.2d 1013 (1993), the court distinguished between policy *implementation* (records were to be disclosed) and policy *making* (opinion and recommendations are exempt).

For the exemption to apply the County must prove four things¹¹: 1) that the document contains pre-decisional opinions or recommendations of subordinates expressed as part of the deliberative process; which was not met. Though there were moments of testimony that the April Plans contained recommendations and opinions, and even that the whole set of plans were opinions and recommendations ... when the rubber met the road, the witnesses could not point to a single recommendation or opinion in the document.

The second element is that disclosure would be injurious to the deliberative or consultative function of the process. Again, the County failed to meet this element. The closest they came was when the Court was questioning Mr. Bridges about these elements (which was the first time he was asked about them and given the opportunity to meet the County's burden) and he testified that they were trying to be "respectful to the Tribe" ... but failed in any regard to show (let alone prove) that disclosure of the documents to Mr. Eggleston would be "injurious" to the process.

The third element that the County would have to prove was that "disclosure would inhibit the flow of recommendations, observations and opinions." Nothing, not a single word of testimony nor any exhibit, no evidence whatsoever, was offered

¹¹ These elements are set out in *PAWS II*, at 256.

to prove this element. Indeed, Mr. Bridges offered testimony *directly contrary* to this when he testified that in fall 2011 (six months prior to the April request) the County was instructed by FHWA to provide the preliminary plans to Mr. Eggleston so that he could provide comment and input during the 30 day comment period available to all the involved agencies (including the Nez Perce Tribe). Thus we see, not only would it not be injurious ... it was expected and helpful.

The fourth element is that the “materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.” Here again, despite attempts to couch the plans as “opinions and recommendations”, not only was the County unable to point to a single recommendation or opinion contained therein but every witness with a basis of knowledge testified that the plans are graphical representations of facts and data. This was asked of Jim Bridges, Randy Noble, and James Ayers; and each of them agreed that the plans are such graphical representations of facts and data.

The County failed to prove any of the elements, let alone proving all 4, which must be done for the exemption to apply.

The claimed exemption does not apply. **But, assuming arguendo** that it did apply to something in the plans, the County still violated the law because they refused to disclose or produce the entire record. *Even if* the exemption applied to some information included in the record, then the County *could have* redacted those portions which were actually part of the deliberative process, and were duty bound to produce the rest (along with an exemption log). But the County chose not to

follow the law. They are in violation even if we assume they proved that which they did not attempt to prove.

2.4 Public Record.

The plans requested were public records.

A public record is a record “related to the conduct and performance of a governmental function.” *Tiberino v Spokane County*, 103 Wn.App. 680, 689, 13 P.3d 1104 (2000).

The Public Records Deskbook published by the WSBA states:

The PRA’s definition of a “public record” – any writing “regardless of physical form or characteristics” – is so broad that it is hard to conceive of a form of information that is not covered. (*See* WAC 44-14-03001 (Attorney General’s model rules on public records) (discussing definition of “public record”). Consequently, no case describes this element in detail. E-mail is a “public record.”

§3.2(1), 2010 edition.

The PRA adds that the record must be “prepared, owned, used, or retained by any state or local agency....” RCW 42.56.010(3).

In the case at bar, the County argued that it is not a public record because it was never “put to paper” until December. This argument is frivolous and is soundly rejected by a cursory review of the definition of a public record ... “regardless of physical form or characteristics” (*Id.*)¹²

¹² *See also: Fisher Broadcasting*, at 523-4:

We recognize that neither the PRA itself nor our case law have clearly defined the

Prepared. Randy Noble testified that Exhibit 23 is a copy of the contract between TD&H and Asotin County. When asked if the records were prepared using public funds, the answer was “yes.” Not a single word was uttered to contradict this. When asked who TD&H took their direction from, Mr. Noble explained that all direction was received from Asotin County.

Reviewing Attachment A, page 1, Mr. Noble agreed that the structure referenced thereon is correct: TD&H was contracted with Asotin County and answered only to Asotin County. TD&H received direction from Asotin County and only made changes to plans as directed by Asotin County.

When both the April and July plans were prepared, including any changes that lead to those documents, it was at the direction of Asotin County.

Owned. Exhibit 23 leaves nothing to the imagination and nothing to doubt: all the documents (designs, drawings, specifications, documents) are owned by Asotin County. (*See* Exhibit 23, page 2 of 8.) This is echoed again at Exhibit B-1, Page 3.

Again, Mr. Noble testified that the plans were paid for by public funds,

difference between creation and production of public records, likely because this question did not arise before the widespread use of electronically stored data. Given the way public records are now stored (and in many cases, initially generated), there will not always be a simple dichotomy between producing and existing record and creating a new one. But “public record” is broadly defined and includes “existing data compilations from which information may be obtained” “regardless of physical form or characteristics.” RCW 42.56.010(4), (3). This broad definition includes electronic information in a database. *Id.*; *see also* WAC 44-14-04001. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record.

prepared by public funds, printed by public funds, etc. There can be no reasonable doubt that Asotin County owns them. Indeed, the County's own memorandum (regarding Mr. Allbrecht) sets out the statutory mandate that the county engineer is *required* to maintain these plans in the engineer's office:

The office of county engineer shall be an office of record; the county road engineer shall record and file in his or her office, all matters concerning the public roads, highways, bridges, ditches, or other surveys of the county, **with the original papers, documents, petitions, surveys, repairs, and other papers, in order to have the complete history** of any such road, highway, bridge, ditch, or other survey; and shall number each construction or improvement project. The county engineer is not required to retain and file financial documents retained and filed in other departments in the county.

RCW 36.80.040 (emphasis added).

That Mr. Bridges later testified that he doesn't keep all those records in his office because he can otherwise get easily confused, is of no consequence. He is bound by statute to keep "the complete history" of the project ... which raises the rhetorical question: If the County does not own it, how can he keep it? Of course the County owns it: the contract and the statutes require it!

Used. The evidence before the Court is also un rebutted as to the County's use of the plans. First, the April plans were used at the April 23rd or 24th meeting.

Though testimony may have dragged a little during portions of Mr. Noble's testimony, there was important items presented, as will now be shown.

Exhibit 5 is the Subpoena Duces Tecum for Randy Noble's deposition. Item number 9 that he was to produce was "[a] copy of all documents that your agency

provided to other participants at the April 23 or 24, 2012 10 Mile Bridge Replacement and Road Realignment Project onsite meeting;”.

Mr. Noble diligently searched TD&H records to document and properly respond to the Subpoena; in response to questions from the County’s attorney, Mr. Noble admitted he went so far as to review over 800 emails as part of his search to properly respond to the Subpoena. After his thorough and documented search, he produced Exhibit 1 as “Copies of all documents TD&H provided at April 23 or 24, 2012 onsite meeting.” The cover sheet on Exhibit 1 explains that TD&H provided 29 pages of “Preliminary Drawings” and 5 pages of “Visual Aids” at the meeting.

Even Jim Bridges had to admit that if Randy Noble said he did it, Mr. Bridges’ had no basis to deny it. Then he elaborated on that to the Court saying something to the effect that consultants often bring boxes of documents for people that he (Bridges) never looks at. Craig Miller testified similarly, going so far as to admit he didn’t even have all five pages of “visual aids” that had been presented, but never denying they were given out.

Rich Eggleston’s testimony that he had seen the meeting attendees with the drawing sheets, and then received a set from the Nez Perce Tribe before asking Asotin County for a copy is completely consistent with Randy Noble’s testimony.

FURTHER, in Exhibit 5, item number 6 that Mr. Noble had to bring included emails regarding public records requests made by Rich Eggleston. Exhibit 6 is a copy of some of those emails and documents provided by Mr. Noble. Seven (7) pages from the end is an email string with the top email dated 5/11/2012 8:48:14 AM from Chris

Ward to Miller, Craig. In this top email we see that Chris Ward is reporting to Craig Miller (Asotin County Project Manager) that the rockery detail has been revised and is now 952 lineal feet.

The bottom email on that page is from erikgc5@aol.com, sent May 07, 2012, 2:23 PM to Craig Miller. Erik signs the email EG; Rich Eggleston identified him as Erik Golub, the representative from Jennings Construction ... the contractor on the 10 Mile project. This email is important because it documents that the April plans had been provided to Mr. Golub for the purposes of pricing the rockeries on the Eggleston property. (“Item is 650 LF. Is this going to be hand laid, mortar joint, or what do you see?”)

These documents were “used” by the County: They were provided by the county’s agent (consulting engineer) at the April meeting; they were provided by the County to their contractor for pricing. They were used.

The Supreme Court instructed us that information in documents need not be applied to the agency’s final work product in order to have been used. They stated,

Rather, the critical inquiry is whether the requested information bears a nexus with the agency’s decision making process. A nexus between the information at issue and an agency’s decision-making process exists where the information relates not only to the conduct or performance of the agency or its proprietary function, but is also a relevant factor in the agency’s action.

...

Information that is reviewed, evaluated, or referred to and has an impact on the agency’s decision-making process would be within the parameters [of agency “use” of the information].

Concerned Ratepayers Association v. Public Utilities District No. 1 of Clark Co., 138 Wn.2d 950, 960-61, 983, P.2d 635 (1999).

In the case at bar, we see that after beginning work from the April Plans (Erik Golub's email and Craig Miller's response), they were changed on May 11, 2012, (*see* the next page of Exhibit 6) to what became part of the June plans. These changes are noted in the Executive Summary pages of Exhibit 6 (*see* the last notation of changes for May 2012). Then, using the June plans, the County decided to remove the rockeries from Eggleston's land: see the next page of Exhibit 6 with the September 4, 2012 email from Craig Miller to Randy Noble: "Please remove the rockery walls between the approaches at Station 14+00 and 15+25 on the right to help us cut cost. This area will be sloped."

The testimony was unrebutted. The exhibits came in without objection. They demonstrate that both the April and June (also called the July) plans were used by the County consistent with the instructions given to us by the Supreme Court.

It should be noted that courts have held that a document "evaluated" (*Olsen v King County*, 106 Wn. App. 616, 623, 24 P.3d 467 (2001)), or "employed" (*Spokane Research I*, 96 Wn.App. at 574-75) by an agency is a "public record."

The documents in this case are public records.

2.5 Violations

There are two (2) 5-Day Response violations:

The County did not ever respond to the August 24, 2012 request, which

requested the withholding log.

The County did not initially respond to the September 7, 2012, which requested the current plans from April 26, 2012, and July 17, 2012. The County did provide the April plans on December 10, 2012.

There are four (4) or five (5) violations of the Adequate Search requirement.

The **April 26, 2012**, search consisted of asking one person if the documents existed. Mr. Bridges testified that he knew the documents resided on the computer of TD&H, but chose not to ask them to print the documents nor even to find out if a “current” set of plans was in existence.

The **July 17, 2012**, search consisted of asking the County’s attorney how to respond. NO SEARCH was conducted. Again, Mr. Bridges testified that he knew the documents resided on the computer at TD&H, but he chose not to ask them for the current set of plans, nor even to ask if the current set of plans existed.

The **August 2, 2012**, search was nonexistent. There is no testimony or evidence of any search.

The **August 24, 2012**, search is the one about which a question may exist. Although there was NO SEARCH, the testimony is resounding that the County did not have the requested withholding document. BUT it would somewhat generous to count this as no violation given that there was no search of any type; Mr. Bridges simply assumed that since he did not create a withholding log nobody else in the County, not even the Public Records officer that is mandated by statute (RCW

42.56.580), created the withholding log that is also required by statute; he assumed since he hadn't seen a withholding log, and hadn't heard of a withholding log, that there wasn't a withholding log. He should have searched.

The **September 7, 2012**, request had no search conducted for it.

There were four (4) requests that resulted in the silent withholding of six (6) documents.

The **April 26, 2012**, request resulted in the silent withholding of one document. Though there was a claimed exemption, as noted above, the document was not properly disclosed.

The **July 17, 2012**, request resulted in the silent withholding of one document.

The **August 2, 2012**, request resulted in the silent withholding of two (2) documents ... both the April and June plans.

The **September 7, 2012**, request also resulted in the silent withholding of two (2) documents ... both the April and June plans.

There were four (4) requests that resulted in the improper denial of documents. The number of days denied is reserved for the penalty phase.

The **April 26, 2012**, request had a failure to produce the document (improper denial) until December 10, 2012. The lawsuit to enforce the PRA in regards to this request was filed in November, 2012, and the production came as a result of the PRA action.

The **July 17, 2012**, request resulted in the failure to produce the document.

The **August 2, 2012**, request resulted in the failure to produce the April plans and the July plans. The April plans were produced on December 10, 2012. The lawsuit to enforce the PRA in regards to this request was filed in November, 2012, and the production came as a result of the PRA action.

The **September 7, 2012**, request resulted in the failure to produce the April plans and the July plans. The April plans were produced on December 10, 2012. The lawsuit to enforce the PRA in regards to this request was filed in November, 2012, and the production came as a result of the PRA action.

There were four (4) requests that either did not have a withholding log or claimed the incorrect exemption.

The **April 26, 2012**, request claimed an incorrect exemption which was not supported at trial. Nor was any other exemption.

The **July 17, 2012**, request had neither a correct exemption nor a withholding log.

The **August 2, 2012**, request had neither a correct exemption nor a withholding log for either the April nor the June plans.

The **September 7, 2012**, request had neither a correct exemption nor a withholding log for either the April nor the June plans.

3. Questions

3.1 “Preliminary” in the PRA v “Preliminary” in engineering parlance.

At the outset of questioning Plaintiff asked Mr. Bridges about certain definitions. This potential confusion is the reason behind establishing these definitions and having them confirmed by other witnesses.

Plans: can include sketches, preliminary plans, or final plans.

Final Plans: when the plans have the engineer’s stamp and signature.

Preliminary Plans: also called draft plans; plans that do not have an engineer’s stamp and signature.

These definitions were consistent with Mr. Bridges, Mr. Noble, Mr. Albrecht, and Mr. Ayers. Mr. Noble noted that it is “a little more” than just the engineer’s stamp and signature, but agreed with the definitions.

There are no PRA cases that the undersigned has found that address the term “preliminary plans”. But the term is used in a number of reported Washington cases: of the 21 reported cases using the term “preliminary plans” only a few offer additional support or insight that is beneficial in this matter.

Providence Hospital of Everett v State, Dept. Of Social & Health Services, 112 Wn.2d 353, 770 P.2d 1040 (1989). This was a suit in which DSHS denied Providence Hospital a “certificate of need” to provide obstetrical services. Both Providence and General hospitals had previously provided such services but had agreed to consolidate such services at General. Prior to Providence’s application for the certificate, General had submitted “preliminary plans for remodeling, which had been approved, and was in the process of submitting final working drawings.” The

State was able to rely on the “preliminary plans” in denying Providence’s application.

Graff v City of Tacoma, 61 Wash. 186, 112 P. 250 (1910), in which the City had preliminary plans, specifications and estimates prepared for the construction of certain bridges. Based on those preliminary plans, the City issued bonds for the estimated cost, and then the project was put out for bid. The bid and the bonds all were reliant upon the “preliminary plans.”

Dalk v Varick Inv. Co., 167 Wash. 678, 10 P.2d 231 (1932), in which Varick Investment Company relied on preliminary plans to enter into an agreement to purchase land and build an apartment house.

The term “preliminary” in the PRA sense is completely different. There is no case in Washington the undersigned could find which resulted in an expansive definition of RCW 42.56.280. Rather, the principle of *ejusdem generis* is more applicable: “Preliminary drafts, notes, recommendations, and intra-agency memorandums” are of the same class or nature as one another and are then subject to the requirement: “in which opinions are expressed or policies formulated or recommended” before they become “exempt under this chapter...” Thus we see that the statute says: 1) items of this class or nature (documents which are not final or on which action has not been taken); 2) which also meet the requirement of having opinions expressed in them; are then 3) exempt.

This understanding remains correct when tested against the Supreme Court’s four-part test to qualify for the exemption. It also remains correct when tested against the Act’s mandate to interpret the Act broadly in favor of disclosure and the

exemptions narrowly. (The Supreme Court stated: “[T]he Legislature takes the trouble to repeat three times that exemptions under the [PRA] should be construed narrowly The Legislature leaves no room for doubt about its intent.” *PAWS II*, at 260.) It further remains correct when tested against the usual canons of statutory construction which apply to PRA cases. Since it remains true with each test, it is fair to rely upon such an understanding herein.

3.2 Exemptions

What is the caselaw on claimed exemptions and the duty to redact?

This is discussed at length in the “Exemptions” section of 2.3 *supra*. In summary, RCW 42.56.210(1) provides that; “the exemptions of this chapter are inapplicable to the extent that information ... can be deleted from the specific records sought.” The duty to redact comes from the dictate of the statute. The leading case on the topic is *PAWS II*.

Regarding 42.56.210, does it apply, and if so, how?

This statute is the statute that requires redaction in favor of withholding a record.

According to the Deskbook, “[e]ven when an exemption may apply based on its plain language, it should only be applied when disclosure ‘would violate personal privacy or vital government interests’ or a ‘vital government function.’ RCW 42.56.210(1), (2).”

When we remember that the proponent of the exemption bears the burden of proving the exemption at trial, the analysis of its application becomes even easier as the County, in the case at bar, did not even attempt to provide evidence to support any possible application of this statute. In *Sargent v Seattle Police Dep't*, the Supreme Court instructs us that it is error to try to find possible applicable exemptions for the agency. The County provided no fact or argument about this being a “vital government function” or “vital government interest”. There was no testimony or evidence to support that this would have, in any way, violated any such interest or function.

Thus, we see that 42.56.210 applies as to the duty to redact rather than withhold, and does not apply as to offering an exemption.

III. CONCLUSION

As set out above, the County violated the Public Records Act in a variety of ways. The County should be found to have violated as submitted in the Plaintiff’s proposed Findings and Conclusions and the penalty phase should be scheduled forthwith.

Respectfully submitted this _____ day of April, 2015.

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