

No. 347605

IN THE COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

Kittitas County Superior Court Cause No. 13-2-00074-4

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KITTITAS COUTNY, a municipal corporation and political subdivision  
of the State of Washington,

Plaintiff/Respondent,

v.

SKY ALLPHIN, ABC HOLDINGS, INC., CHEM-SAFE  
ENVIRONMENTAL, INC.

Defendants/Appellants,

v.

WASHINGTON STATE, DEPARTMENT OF ECOLOGY,

Defendant/Respondents.

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CHEM-SAFE'S REPLY BRIEF

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## I. INTRODUCTION

The DOE has silently withheld and unlawfully delayed the releases of critical and exculpatory records, all of which Mr. Allphin, acting for himself and his companies (“Chem-Safe” or “Mr. Allphin”), requested on October 17, 2012 and had to re-request subsequently. The DOE obstructed discovery requests and refused to release records admittedly existing and in its possession. After denying motions to compel discovery and review the withheld records, the Kittitas County Superior Court entered the DOE’s proposed order, summarily dismissing Chem-Safe’s claims. The DOE’s violations of the Public Records Act are flagrant and numerous. The trial court’s final order should be given no deference; Mr. Allphin seeks de novo review and relief from this Court.

The trial court allowed the DOE to provide false, misleading, and incomplete responses to discovery requests for records already subject to Chem-Safe’s 10/17/2012 records request. To evade answering discovery, the DOE first sought a protective order and then filed a premature and unauthorized “motion for order to show cause”. Chem-Safe objected. Chem-Safe could not fully present its cross-claims at a dispositive hearing, prior to the completion of discovery and without records admittedly withheld by the DOE. The trial court overruled Chem-Safe’s objection,

granted the DOE's "show cause" order, and dismissed with prejudice Chem-Safe's cross-claims.

Chem-Safe requests this Court make clear that an agency cannot force on a requester an unauthorized motion for "show cause". Chem-Safe further seeks reversal of the trial court's order terminating discovery or release of public records, including disclosure of all withheld records, whether in the DOE's possession or the possession of the Washington Attorney General's Office. Chem-Safe also requests partial relief be ordered as to the record-based cross-claims presented by Chem-Safe.

## II. ARGUMENT

### A. This Court's review is de novo.

The PRA, RCW 42.56, is "a strongly worded mandate for broad disclosure of public records." *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007). Judicial review is de novo when agency action is challenged under the PRA. RCW 42.56.550(1), (3). The appellate court stands in the same position as the trial court when the record consists entirely of documentary evidence and affidavits. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252-53, 884 P.2d 592 (1994). This Court is not bound by the trial court's factual findings. *Id.*

The DOE incorrectly deflects from the statutory de novo standard by complaining that Chem-Safe did not appeal findings of fact. DOE's

Response Br. 19 (May 17, 2017). There are no findings of fact in the record, nor does CR 52 require or authorize findings of fact following a show cause motion hearing. See CP 2654-57. There was no trial or evidentiary hearing. Though the trial court signed the DOE's proposed order with recitations to "findings", these were not findings of fact as set forth in CR 52 and RAP 10.3(g). Furthermore, Chem-Safe complied with RAP 10.3(g) by identifying each paragraph of the trial court's order that related to each assignment of error. Appellant's Opening Br. p. 3-4.

There also were no credibility determinations of the affiants. The DOE's assertions that Mr. Allphin's declarations are not credible are inappropriate and not based on factual determinations in the record. DOE's Response Br. n. 24. First, the trial court did not find or state that Mr. Allphin was not credible. CP 2654-58. Second, the DOE has not identified an inconsistent, inaccurate or dishonest statement in the many declarations filed by Mr. Allphin over this prolonged lawsuit. The attack on Mr. Allphin's credibility is wholly unsupported by the record, inappropriate and unnecessary ad hominem argument, prejudicial to Mr. Allphin, and irrelevant to this Court's de novo review of the DOE's violations of the PRA. Further, Mr. Allphin is not a nuisance requester, as cast by the DOE's allegation, including that he filed 28 public records request. Compare DOE's Response Br. 6 with CP 543-44 (explaining the

records requests made and the follow-up communications). See also CP 554. Finally, Mr. Allphin objects to the DOE's attempt to smear his credibility here by alleging that he was operating without a required permit. See DOE's Response Br. 4. The DOE has demonstrably known that Chem-Safe was not required to obtain the County's MRW permit, and further, that operating a MRW facility would be inconsistent with Chem-Safe's permitted transfer/transportation business. CP 1362; see related Supreme Court briefing, including the February 4-7 email chain where both agencies acknowledged that Chem-Safe could not have both permits. Credibility assertions aside, judicial review by this Court is de novo.

**B. No statute, rule, or case authorizes an agency to use a show cause hearing to dispose of a requester's claims.**

On January 22, 2016, the DOE noted a hearing for Chem-Safe to "show cause". CP 99-132. The DOE's motion lacks legal authority or precedent. See Appellant's Opening Br. 18-21. The unauthorized motion failed to address Chem-Safe's crossclaims and forced a premature and dispositive hearing on Chem-Safe, resulting in dismissal of Chem-Safe's claims without an opportunity to be heard on the merits and without legal standards and procedures for the parties to frame and present the claims. *Compare with* CR 12 or 56's detailed processes and standards for summary dispositions.

The Civil Rules do not authorize a dispositive “show cause” motion. *Compare with* highly detailed process in CR 65(b). The PRA does not authorize an agency to seek a “show cause” hearing. RCW 42.56.550(1)-(2). PRA lawsuits are not special statutory proceedings. *Neighborhood All. of Spokane Cty., v. City of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). The Civil Rules apply. *Id.* The DOE must follow the rules. It had available the full range of tools under the Civil Rules, but chose to go outside the rules to avoid their legal standards and burdens. This Court should stop this unauthorized and harmful manner of proceeding, in order to protect the integrity of the PRA and the Civil Rules. The error is not harmless, generally, or in this case.

The DOE incorrectly states that “numerous courts have” conducted hearings on an agency’s show cause motion. DOE’s Response Br. 20. What the DOE fails to acknowledge is that, in all these cases, the appellate courts mostly recited this as a fact of those cases’ procedural history or reclassified the motion as a CR 12 or CR 56 motion. See *Kozol v. Dep’t of Corr.*, 192 Wn.App. 1, 5-6, fn. 3 (Div. 3 2015) (treating motion as “show cause motion to dismiss” or “dismissal motion” akin to a CR 12 motion); *Wood v. Thurston Cty.*, 117 Wn. App. 22, 68 P.3d 1084 (Div. 2 2003) (reciting that the statute “allows [the requester ] to require the [agency] to show cause...”); *In re Request of Rosier*, 105 Wn.2d 606, 608, 717 P.2d

1353 (stating, opposite of the DOE’s position here, that the Public Utility “District was brought into court by a show cause order”); *Benton Cty. v. Zink*, 191 Wn.App. 269, 361 P.3d 801 (2015) (County sought declaratory judgment and summary judgment; this case does not even mention a show cause motion); *Mckee v. Dept. of Corr.*, 195 Wn.App. 1046 (Div. 3 2016) (unpublished) (unpublished opinion where “Department of Corrections brought a motion asking ‘for an order determining whether there has been a violation...’ captioned as a motion to show cause, the requester “did not object to the trial court conducting a show cause hearing”, and the judge treated the motion “as if it was a summary judgment motion.”)<sup>1</sup> There is no judicial precedent approving the agency’s use of a show cause hearing to dispose of a requester’s claims.

The DOE defends, alternatively, that any error caused by its improper motion is harmless. DOE’s Response Br. p. 21. The DOE reasons that discovery was terminated on July 13, 2016, leaving “nothing more to do”. The DOE is wrong. *Wash State Dept. of Transp. v. Mendoza de Sugiyama*, 182 Wn.App. 588, 602-603, 330 P.3d 209 (Div. 2 2014) (citing *O’Connor v. Wash. St. D.S.H.S.*, 143 Wn.2d 895, 25 P.3d 426

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<sup>1</sup> *Mckee* is an unpublished opinion, cited pursuant to GR 14.1 by the DOE. It has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

(2001) (requester entitled to seek available public records under civil discovery rules or the PRA). The trial court should be reversed with a remand to consider the claims pursuant to legal standards and processes. Chem-Safe is entitled to adjudication of its claims on the merits.

There could not be more prejudice here. Material facts were disputed. Discovery was pending and prematurely terminated. The DOE admittedly continues to possess undisclosed and withheld records. The trial court has deprived Chem-Safe its day in court pursuant to an unprecedented and unauthorized process that lacks legal standards and due process afforded by following the Civil Rules. The motion cannot be reclassified post-facto; Mr. Allphin raised the objection immediately. CP 528-531 and did not join the motion, except to present those claims .

The PRA, the Civil Rules, Chapter 44-14, WAC, promulgated by the Attorney General's Office under authority of the PRA, and common law do not allow an agency to move for a dispositive show cause hearing. The Court should remand for completion of discovery and disclosure of the records to enable an adjudication on the merits of Chem-Safe's claims.

**C. The records admittedly withheld by the DOE are public records subject to release or listing on an exemption log.**

The DOE admits it has not disclosed responsive records. A "document is never exempt from disclosure". *Sanders v. State*, 169

Wash.2d 827, 836, 240 P.3d 120 (2010). The records appear to be a combination of attorney emails, County records, and records related to Chem-Safe's property and business operations. Chem-Safe cannot describe these records more specifically because the DOE intentionally withheld them and refused to disclose their existence. Only during a discovery dispute years after the original records request did the DOE, possibly inadvertently, acknowledge that this additional group of records existed. See DOE's Response Br. 22; CP 2195, 1556, 1531-32, 1549-50.

The DOE admitted that these requested records exist, but refused to release them. CP 2203-04. The DOE again acknowledges here that some of the undisclosed documents on its shared database include non-exempt County records. DOE's Response Br 23, n. 18. As fewer than 11 of the County's records were enjoined out of the hundreds originally claimed exempt, several of these records likely are non-exempt. An agency cannot hide an otherwise non-exempt record by transferring it to its attorney. The DOE admits as much, "[a]lthough the documents shared for attorney review were often not privileged..." DOE's Response Br. 23. There is no justification for this non-disclosure and withholding.

The DOE does not deny these records exist, does not deny that it failed to disclose the records, does not deny that it withheld them without providing an exemption log, and does not deny that the records are

responsive to Chem-Safe's October 17, 2012 request. Rather, the DOE complains about a discovery "fishing expedition" and faults Chem-Safe for a "last-minute" request for these records. DOE's Response Br. 22. First, "fishing expedition" could be a defense in discovery but is clearly not a defense to delivery of records when requested under the PRA. WAC 44-14-04002(3); WAC 44-14-06002(5). Second, Chem-Safe is not on a fishing expedition as Chem-Safe has a factual basis for believing these responsive records exist – the DOE admits the records exist. Third, the "last-minute" timing had everything to do with the fact that the DOE did not disclose these records' existence timely. Chem-Safe moved diligently on the DOE's late disclosure. CP 1531-32, 1549-50.

The DOE and the trial court, conversely, hurriedly pushed the improper, prejudicial, and dispositive show cause hearing on Chem-Safe so as to terminate discovery, in camera review, and disclosure and release of these records to Chem-Safe, which it has a legal right under the PRA to possess and review. The DOE was nearly successful in silently withholding the records without disclosure altogether. The trial court's refusal to address or rule on the issue condones the DOE's silent withholding and consequent misbehavior.

Chem-Safe moved the Court to lodge the withheld records for in camera review. CP 2192-2201. The records include those stored on the

DOE's "AG Secured" drive. CP 2203-04, 2208-09. Some of the records stored there may be exempt attorney-client privilege or work product protection, but others are not. DOE's Response Br. 23. Regardless, the DOE has never claimed a privilege for these records or created an exemption log, despite its clear obligation under the PRA to do so. Not to log such records undermines the purpose of the PRA. *Rental Hous. Ass'n v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009). Chem-Safe is not requesting more of the DOE than that required by the PRA.

Similarly, Chem-Safe moved for review of 60+ pages of redacted records that the DOE released in April 2016. CP 2196, 2198, 2066. Again, this timing followed the DOE's withholding and last-minute release, not Chem-Safe's lack of diligence. The records consist of five separate emails from Ms. Day (DOE employee) to the County dated April 1, 2013. CP 2204-05. The five separate emails transmit seventeen ".pdf" documents. CP 2204-05. Chem-Safe first became aware of these five emails and transmitted .pdf documents when the DOE records custodian partially released the record (known as "Binder1.pdf") on May 20, 2016. CP 2204-05. Though clearly referencing five separate transmitting emails, the DOE's release only included four of the five emails. Chem-Safe again requested the full transmission, including the missing email and the missing attachments. CP 2205. The DOE responded on May 31, 2016,

providing the omitted email, but not the seven attached .pdf documents to that email. CP 2205. Furthermore, the DOE also refused to provide the five emails in “native format”, which would have allowed examination of metadata, even though the Court ordered that the cover emails and attachments be provided in native format. CP 1523-25.

The DOE responds that Chem-Safe’s request is based on “pure speculation about possible over-redactions.” This hyperbolic accusation is easily refuted. The DOE’s redactions include more than 60 pages of full-page redactions. CP 2196, 2198; see also CP 1423-24. In the prior proceedings, there were fewer than 11 individual emails sealed and enjoined. CP 2513. Records cannot be over-redacted so as to include non-exempt information. WAC 44-14-04004. The County’s exemption logs identify the number of pages withheld. None of the 11 enjoined records are longer than one or two pages. Simple math leads to only one conclusion: the DOE’s 60+ pages of redactions covered far more records than those 11 enjoined by the trial court in the related proceedings.<sup>2</sup>

The DOE also responds that the trial court had already terminated discovery and that Chem-Safe “essentially sought documents it already

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<sup>2</sup> The trial court had also entered a second sealing order on February 15, 2015, that affirmed the County’s withholding of 21 individual emails. This second sealing order did not enjoin the DOE from releasing records. CP 2512, CP 2204.

possessed.” These defenses have no merit. The trial court’s discovery order has no bearing on the DOE’s withholding and over-redaction of public records, for which Chem-Safe sought relief under the PRA. The DOE’s argument that Chem-Safe “already possessed” the records is quixotical, since the DOE redacted the 60+ pages. Ultimately, this Court cannot even review the contents of the 60+ pages of redactions to determine whether Chem-Safe “already possessed” the records, because the trial court allowed the DOE a pass by wrongly denying Chem-Safe’s motion for in camera review.

The DOE’s last-minute release in April/May 2016 revealed additional violations that the trial court failed to address. For example, the DOE intentionally withheld the 9/20/13; 10:33 email at the specific request of the County’s attorney, who acknowledged the lack of exemption but requested it be secretly withheld. CP 2209 (referencing the email as “Number 19” in this 4/1/13 email to the DOE and discussing its contents). CP 1424-25. The 9/20/13; 10:33 email has not been sealed or protected. CP 2513. No justification exists for the DOE’s redaction of the 9/20/13; 10:33 email. CP 2282. The DOE’s attorney, Mr. Overton, misrepresented to the trial court that the only redacted emails in the “Binder1.pdf” were those records already under seal. RP 10:15-11:12. The

9/20/13; 10:33 email and others are not sealed or placed on an exemption log. RP 12:13-13:7. They have been wrongly and silently withheld.

**D. The DOE violated the PRA when it unlawfully withheld four sketches and other records.**

1) Four sketches. The DOE refused to release these records until July 28, 2015, CP 2397, and then released them only after being sued, served informal and formal discovery, and having its employees deposed. Such litigation tools should not be required of a requester to obtain public records. It is antithetical to the PRA's policy of prompt and inexpensive access for public records.

The DOE responds only that it might have released the four sketches electronically or might have made them earlier available for inspection. The arguments are spurious. The DOE's practice was to provide electronic copies. The four sketches were not provided electronically. After Mr. Allphin raised the claim, the DOE had the opportunity to point to such an electronic production. It did not do so because it never provided the records electronically, as Mr. Allphin has repeatedly pointed out. In fact, the DOE expressly told Mr. Allphin three times in 2013 that all responsive records had been released electronically. See Appellant's Opening Br. 10-11. The DOE never indicated to Mr. Allphin that records were being kept separately in the physical file.

Similarly, the four sketches were not made available for Mr. Allphin's review in December 2014. These four sketches are the DOE's employee's hand-drawn maps of the Chem-Safe premises, which should have included the locations of the alleged spill sites. CP 2421-24, CP 546-47, CP 1206. The four sketches were admittedly in the DOE's possession on 10/17/2012, CP 2409-16, as confirmed by an email dated 10/18/2012 memorializing their author's delivery of the sketches to the DOE's records custodian, CP 2419. Mr. Allphin's entire quest for public records has been to uncover the location of the alleged spill on his property. He repeatedly requested this information from the DOE and was on the lookout for maps, photos, drawings, etc. in the DOE's files and knows definitively that the four sketches were not included in his December 2014 inspection. CP 546-47, 1206. The DOE has not produced any evidence of a spill because no spill ever occurred. CP 1362.

Only after the DOE's employee admitted that the four sketches existed during a June 2015 deposition did the DOE return the four sketches to the physical file, making them available to Mr. Allphin in July 2015. CP 546-47. Earlier, and upon specific requests for the sketches in 2014, the DOE's attorney Travis Burns falsely stated that the records had already been released. CP 2420. These are critical records as they relate directly to Chem-Safe's informal, then formal, requests for

evidence of the alleged spill, including its location, so that it could conduct appropriate soil sampling. CP 1206. The information was critical to the court-ordered development of a testing plan to determine whether specific toxins had been released into the environment. CP 544. The records were withheld unjustifiably.

2) Mr. Peck's review of Chem-Safe's sample plan. The DOE responds only that this record was a County record, not a DOE record. DOE's Response Br. 32. The DOE does not deny that the handwriting on the document is that of its employee, Mr. Peck. The DOE did not provide a specific response from its many affiants that this record did not exist. The fallacy of the DOE's general denial is exposed by the questions: how, then, did the DOE's employee's handwriting get on the record? How did the DOE's employee review the draft sampling plan and provide his comments if it is not a DOE record? Careful review of the DOE's response reveals that the DOE is not outright denying the record is, or was, in its possession. Further, the DOE's employee authoring the notes, Mr. Peck, did not disclaim possessing the record. It is possible that the DOE destroyed the document, in violation of the Public Records Retention Act, RCW 40.11. CP 553, 1207. It is even likely that the DOE's employee had destroyed or secreted away this record, in an attempt to destroy the evidence that contradicted his three false declarations and discovery where

he stated he had not reviewed Chem-Safe's sampling plan. CP 847-50, 1203, 1367, 2067, 2206. Regardless, the record either is or was a record possessed by the DOE and relied upon by the agencies. The DOE's failure to produce the record violates the PRA.

3) 53 emails and 9 documents by Mr. Peck. The DOE responds that Mr. Allphin must be confused, but fails to point out where in the record it released the 53 emails or the 9 documents identified by Mr. Allphin. The DOE attempts to shift the burden to Mr. Allphin and fault him for not providing this court record with the thousands of pages of records released to him DOE's Response Br. 31, n. 24. As customary and appropriate, Mr. Allphin reviewed the thousands of pages of released documents and provided to the court only those records, or lists of records, relevant to his claims that the DOE violated the PRA. CP 547-48. Mr. Allphin sufficiently identified and alleged that the 53 emails and 9 documents were withheld inexcusably from October 17, 2012 until December 2014. CP 2486-91. The DOE failed to respond meaningfully. The DOE could not and did not identify any earlier time when it had released these records. The DOE had the opportunity to prove that Mr. Allphin was "confused" or "wrong" by pointing to its earlier releases. The DOE could not do so because Mr. Allphin was precise and correct in his identification that these records had been withheld.

Converse to the DOE's claim that Mr. Allphin has confused and exploited the record, it has been the DOE who has taken inconsistent positions. For example, the DOE's records custodian, Mr. Johnson, first stated in his deposition that he gave a volume of records known as "DVD2" to Chem-Safe in the spring of 2013 (despite the fact that "DVD2" contains 2014 records), but now claims in his declaration that he made the "DVD2" in December 2014. CP 2399-2400. By further example, 11 of the 53 emails identified by Mr. Allphin as wrongly withheld until December 2014 had been stored in another volume of records known as "Binder1", which was released for the first time in April/May 2016, which further demonstrates that the DOE and its attorney Mr. Burns possessed and had been withholding the records, at the request of the County, for that entire time. CP 2205, 2800-02. Also, for example, one of the documents released for the first time in December 2014 was a falsified "field investigation report" that the DOE desired to withhold, see CP 547, RP 54:12-25, as the report falsely stated the DOE inspected the premises on 1/27/11, CP 2399-2400, approximately three months before receiving a report of a spill. See DOE's Response Br. 4 (confirming that the DOE did not receive the County's report of a possible spill until April 2011).

The DOE's attorney, Mr. Burns, represented to the parties and to the trial court on May 17, 2013 that the only documents withheld by the

DOE were those listed on the County's 4/2/13 exemption log. CP 78:5-11, 2206-07. Subsequent proceedings proved this false. The trial court and Chem-Safe relied on this representation. The trial court entered a continued temporary restraining order enjoining the DOE only as to those emails identified on the 4/2/13 exemption log. CP 83:17-25. Subsequent releases by the DOE, including, for example, the "DVD2", "Binder1.pdf" and the five separate emails from Mr. Burns to Ms. Lowe, dated April 1, 2013, demonstrate that the DOE had been withholding several additional and different emails than those listed on the 4/2/13 exemption log, at the request of the County.

4) Failure to respond to the 1/8/14 request. The DOE responds now that the 1/8/14 request was so narrow as to include only a few responsive records. The DOE cannot rewrite history. CP 1201-03. The DOE's own record custodian confirmed in writing that the 1/8/14 request was an extension of the earlier 10/18/12 request to include all responsive records generated from 10/18/12 to 1/8/14. CP 551 (DOE's confirmation email, stating that the DOE understood the new request "will have any/all documents that Ecology has received and/or generated from October 1, 2012 through January 8, 2014.") It is true that Mr. Allphin and Mr. Johnson had developed different language to reference the requested records. CP 847, 2627. Regardless, Mr. Allphin and Mr. Johnson had a

mutual understanding of the records requested, as confirmed by Mr. Johnson's response. CP 551, 847, 2628-29. Other internal DOE emails confirm the same mutual understanding. CP 2630-31. Some of these DOE employees internally produced the responsive records for the entire duration of October 1, 2012 to January 8, 2014, but the DOE's records custodian chose to withhold these records from Mr. Allphin. CP 551.

When the DOE had still not released records, or provided an estimated timeline, Mr. Allphin emailed Mr. Johnson on February 5, 2014, asking him to "please give me a timeline as to when I could expect the requested information?" CP 551. On February 11, 2014, the DOE finally responded and provided a few documents that Mr. Allphin had previously received. CP 551. As this was vastly fewer documents than were requested, Mr. Allphin immediately responded to Mr. Johnson, questioning, "Is this the complete response?" CP 551. Mr. Johnson replied the next day that he had included "all responsive documents". CP 551. At no time did Mr. Allphin withdraw or narrow his request nor did the DOE notify Mr. Allphin that it was treating his request more narrowly than stated initially or that it had clarified the scope of the request. CP 551-52.

Having failed hugely to respond to Chem-Safe's 1/8/14 request, the DOE has offered several, inconsistent alibis, all of which are lies. CP 550-52. For example the DOE first alleged that Chem-Safe withdrew or

narrowed its request by phone call on January 16, 2014. CP 2420. Then its records custodian alleged in deposition that this phone call occurred on February 5, 2014. CP 2632-33. Then the same custodian stated in declaration that it occurred on February 6, 2014. CP 2634. The DOE's phone records show no call occurred, CP 1368; Mr. Allphin never would have agreed to withdraw or narrow his request. See also CP 550-52, CP 1201-03. There is no record or memorialization of any such withdrawal, narrowing, or other modification because Mr. Allphin did not, and would not have, so agreed. CP 1201-03.

In this appeal, the DOE makes an entirely new argument that the 1/8/2014 request only sought those records with the keyword numbers that identify the DOE's filing system. DOE's Response Br. 35. This argument, too, is not possible to reconcile with the factual history, particularly the DOE record custodian's statutorily-required response confirming his response "will have any/all documents that Ecology has received and/or generated from October 1, 2012 through January 8, 2014." CP 551. The DOE refused, and continues to refuse, to release the records responsive to Mr. Allphin's 1/8/14 request, in violation of the PRA. Chem-Safe knows that responsive records dated between 10/18/12 and 1/8/14 exist, based on common sense and based on the DOE's releases of some of these records. See Opening Br. 16; see example record CP 2425-27.

**E. Failing and refusing to search for and provide agency “sent emails” is a de facto unreasonable search.**

The DOE responds generally that Mr. Bleeker’s deposition transcript does not mean what he said. DOE Response Br. 26. The DOE has attempted to back-fill Mr. Bleeker’s deposition testimony with an inconsistent, subsequent declaration. CP 135 at ¶¶ 26-27. The rule that “self-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact” should apply here. *McCormick v. Lake Wash. School Dist.*, 99 Wn.App. 107, 111, 992 P.2d 511 (1999); *Baldwin v. Silver*, 165 Wn.App. 463, 472, 269 P.3d 284 (Div. 3 2011). The deposition transcript shows that Mr. Bleeker did not search his Microsoft Outlook “sent items” folder for his sent messages. CP 550, 2469, 2471. Chem-Safe raised the question because all but two of Mr. Bleeker’s “sent messages” were missing. CP 550, 2399. Chem-Safe knew that “sent messages” existed in Mr. Bleeker’s files because some of his sent emails were released from the recipients. CP 2399. The DOE’s records custodian, Mr. Johnson, did not notice, or disregarded the fact, that Mr. Bleeker’s sent emails were missing, nor provide him with instruction to search all of his email records. CP 550; CP 2481-85.

Mr. Bleeker also testified in his deposition that he did not delete sent messages and never had. CP 550. However, his subsequent

declaration claims he occasionally deleted sent emails for storage capacity purposes or because they lacked retention value. DOE's Response Br. p. 27, n. 21. This contradictory, self-serving declaration should be disregarded. Mr. Bleeker clearly admitted in his deposition that he did not search for sent messages, CP 2469, 2471, and his released records to Chem-Safe do not contain his sent emails. CP 550. Furthermore, the DOE's argument in this response brief that records without retention value were routinely deleted, DOE's Response Br., 27, n. 21, contradicts its amicus brief in the Supreme Court where the DOE claimed its emails were withheld "litigation emails". See amicus brief at Appellant's Opening Br. Appdx. A. Finally, no responsive records can be destroyed once requested or litigation ensues. WAC 44-14-03005. Mr. Bleeker's search was not reasonable, and the trial court should be reversed. CP 1365.

**F. Coordinating and collaborating with a separate agency to conceal public records violates the Public Records Act.**

The DOE had a duty under the PRA to provide Chem-Safe the "fullest assistance" and to release records promptly. RCW 42.56.100; WAC 44-14-04003(2). The DOE provided fullest assistance to the County, but not to Chem-Safe. CP 1366. The DOE even sent the records requested by Chem-Safe on 10/17/2012 to the County months before releasing them to Chem-Safe. CP 1203-05. The DOE seeks the shield of

the notice process described in RCW 42.56.540, but that is not what occurred here. DOE Response Br. 28. The DOE did not notify the County that its records had been requested. RCW 42.56.540. The DOE did not notify the County that it would hold the records for 10 days unless an injunction issued. WAC 44-14-04003(11). To the contrary, it was the County that solicited the DOE to withhold the records for several months, which the DOE knowingly, illegally and in violation of its duties under the PRA and Chapter 44.14, WAC, agreed to do despite not claiming the records to be exempt. DOE Response Br. 8; CP 233. The DOE did not have “a reasonable belief that the record is arguably exempt”. The DOE did not claim work product exemption over the County’s emails. *Id.*

Not only did the DOE collusively stand by and withhold records unlawfully at the County’s behest, but also it collusively stood by and implicitly contributed to an outrageous misrepresentation by the County’s deputy prosecutor, who stated three times in declarations that she did not know that Chem-Safe had sent the DOE a simultaneous records request. CP 555, 1367, 2067. Having allowed, without notification or objection, that lie to be carried through the related lawsuit, including adoption by the courts, the DOE now relies on a different history. Either the DOE should be precluded from changing the facts of the case to be advantageous to its argument or it should be found in violation of the PRA for failing to fulfill

its PRA duties to Chem-Safe when it agreed to participate in the County's unlawful withholding and did not place any person or court on notice of the perjured statements of the County's prosecutor. CP 555, 2067.

Furthermore, records finally released on or about April 29, 2016, demonstrate that the DOE and the County agreed to silently withhold at least two critical emails. See 4/1/13 email chain between Mr. Burns (DOE) and Ms. Lowe (County) at CP 2425-27. The DOE coordinated to withhold the two emails (10:33 a.m. and 11:26 a.m. emails). CP 2428-33. Though never sealed or exempted, the DOE continues to redact unjustifiably this 10:33 a.m. email. *Id.* Further, the DOE and the County coordinated to remove the records from the exemption log and not disclose their existence to Chem-Safe. CP 2434-35 (County's exemption log related to this record, which shows the unlawful manipulation of the record to remove the offensive 11:26 and 10:33 emails from the email chain. The DOE did not notify or object to the County's alteration of this exemption log, and withheld the records consistent with the alteration (and continues to redact the 10:33 email, without any basis for doing so)). See also CP 1205, 1367-68. Last, the DOE refused to release these emails at all until December 23, 2014. CP 2398; see also CP 2203, 2206. The DOE did not provide fullest assistance to Mr. Allphin, but coordinated with the County to obstruct the release of records.

The DOE's entire process includes systemic failure to release responsive records and to respond timely, followed by an attempt to confuse the record and cover up its many violations. Cooperation was collusively and illegally accorded to the County to cover its misbehavior and not provide records fully and promptly to the requests, as required by the PRA. That is not the fullest assistance to the requester envisioned by the letter and spirit of the PRA. RCW 42.56.100; WAC 44-14-04003(2).

### III. CONCLUSION

Chem-Safe respectfully requests this court reverse the trial court's "Order granting Ecology's Motion to Show Cause and Dismissing Chem-Safe's Claims with Prejudice" and remand for complete discovery, in camera review, a penalties hearing on Chem-Safe's records-related claims presented, and further proceedings, including ordering the DOE (a) to release or (b) to produce an exemption log for, the undisclosed and withheld records in its secured databases and the overredacted emails, as well as submit those records for in camera review.

Respectfully submitted this 15<sup>th</sup> day of July, 2017.

DAVIS, ARNEIL LAW FIRM, LLP

By: 

Nicholas J. Lofing, WSBA # 43938

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37951

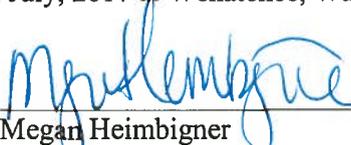
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I served the document(s) to which this is attached, in the manner noted on the following person(s):

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DATED this 17<sup>th</sup> day of July, 2017 at Wenatchee, Washington.

  
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Megan Heimbigner

**DAVIS ARNEIL LAW FIRM, LLP**

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