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No. 375056  
Supreme Court Case No. 97927-8  
Yakima County Superior Court Case No. 19-2-02284-1

THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON DIVISION III

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ANDREW L. MAGEE, Appellant,

v.

YAKIMA SCHOOL DISTRICT NO. 7, Respondent

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BRIEF OF APPELLANT

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I  
PREAMBLE

This appeal is respectfully submitted by Appellant, Mr. Andrew L. Magee to be timely and proper seeking *de novo* review and reversal and/or remand with instructions - of the favorable ruling of the trial Court on Appellee's, Yakima School District No. 7's (YSD) Motion for Declaratory Ruling and Summary Judgment (Motion) and supporting affidavits (CP 16-122,) and resulting order(s) (CP 207-210) and Judgment(s) (CP 230-31,) *et al.*, and – to make a finding in favor/consistent with Mr. Magee's/Defendant/Appellant's Response to Plaintiff's Motion for Declaratory Ruling and Summary Judgment and CR 56(b) Counter-Motion for Summary Judgment and for Sanctions Costs and Attorney's Fees (Response.) (CP 123-25/126-167) Mr. Magee respectfully requests that in addition to his attorney's fees/costs pled in the trial Court (CP 123-25,) that the same be awarded on this appeal, and respectfully requests that this appeal be granted oral argument.

## II INTRODUCTION

As judicially admitted by Appellee (See footnote 2 & 5 herein,) YSD, *per* the Revised Code of Washington (RCW,) Chapter 42.56 RCW Public Records Act (PRA), Appellant, Mr. Andrew L. Magee (WSBA# 31281,) as a Requestor, timely and properly submitted a public records request upon YSD, a state agency, on November 27, 2018. (CP 24, line 8)

At first, YSD balked, but after clarification by Mr. Magee (CP 25, lines 8-18) and after consultation and with assistance of counsel (CP 70,) (and as required by law, a trained public records officer – See RCW 42.56.152, *et al.*, See also, (CP 67) whereby YSD admits the existence of “our Public Records Officer . . .”) YSD - claiming no exemption, nor demand/opportunity to redact, (See RCW 42.56.520 – Prompt responses required, *et al.*, to include that “Denials” *taken at that time*, become the “final agency [YSD] action.” RCW 42.56.520(4)), and with the assistance of counsel and Public Records Officer – acquiesced, resolving any/all threats/disputes of any kind whatsoever, and knowingly, voluntarily, and

intelligently announced its final agency action and the release of the documents to Mr. Magee, stating:

The Yakima School District has identified the existence of records responsive to your request. . . . We invite you to schedule a time for your review of the first installment, which is available now. We anticipate having a second installment available by March 15 [2019]. We will then notify you of subsequent installments as they become available.

(CP 70) (emphasis added)

Thereby, at YSD's invitation, with no dispute/threat/litigation pending/in existence re Mr. Magee's request, and at Mr. Magee's time and expense, and on three separate occasions, Mr. Magee travelled to YSD's offices and was provided the documents/facility to copy, pay for, and did receive the first of three installments. (CP 26, lines 11, 14 & 15)

YSD - only *after* (on or about April 11, 2019, after the second installment had been delivered to and paid for by Mr. Magee, (CP 26, line 18), and after making no claim of exemption/redaction/withholding, and with no dispute between the parties at all (Mr. Magee was receiving his request at YSD's

invitation,) - only then, and inconsistent with the law, YSD suggested it was claiming an exemption? (CP 26, line 19)

YSD, then, from whole cloth - and in contradiction/dispute only with itself – without a basis in fact or law, fabricated a so-to-speak, *dispute* between itself and Mr. Magee (that in fact and as a matter of record - and if a dispute at all - had been fully resolved resulting in production and invitation to Mr. Magee to receive the documents (this was not acknowledged to the Court by YSD,) and took action against a/the PRA requestor, Mr. Magee(?) resulting in an impossible distortion and motion for summary judgment brought by YSD against Mr. Magee seeking a *declaratory* ruling and order on summary judgment that the records (already released *en masse*) to Mr. Magee were/are to be withheld in their entirety in response to the Defendant's (Mr. Magee's) public record request. (CP 16)

Mr. Magee, preserving all and waiving no rights, claims, exceptions, objections motions *et al.*, Answered (CP 10-12) and then responded to YSD's Motion for Summary Judgment

(Motion) per his Defendant's Response to Plaintiff's Motion for Declaratory Ruling and Summary Judgment and CR 56(B) Counter-Motion for Summary Judgment and for Sanctions Costs and Attorney's Fees (CP 126-145 ) (Response,) accordingly piercing<sup>1</sup> YSD's pleadings/affidavits and competently argued that YSD was:

A. Without a basis for jurisdiction/standing to bring its action, *i.e.*, this action was without a basis in fact or law, (CP 128,) (See, *Sheats v. City of East Wenatchee*, 6 Wn.App. 2d 523 (2018),) *i.e.*, that it is only the person(s) - whose documents/information were wrongly acquired and kept by YSD and personal information that was already (and to be) revealed that have any legal standing to bring suit against the requestor (*e.g.*, Mr. Magee and/or YSD, *i.e.*, what suit can be brought against a Requestor by the state agency? – NONE,) (CP 129) See also, RCW 42.56.520 re Prompt response required (but in fact not done) by YSD) (CP 128-132), See also, RCW

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<sup>1</sup> See *W.G. Platts v. Platts*, 73 Wn.2d 434, 438 P.2d 867, 1968 Wash. LEXIS 649, 31 A.L.R.3d 1413 (1968), quoting *Reed v. Streib*, 65 Wn.2d 700, 706, 399 P.2d 338 (1965), therein citing, *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605, 1960 Wash. LEXIS 554 (1960) “The purpose of the summary judgment rule is to permit the court to pierce such formal allegations of facts in pleadings when it appears there are no genuine issues.”

42.56.550 – Judicial review of agency actions (not requestors,) providing only for a requestor (Mr. Magee) to seek review in Superior Court upon a *denial* of release of documents, not the other way around,) and that:

B. YSD's action was the equivalent of Self-Reporting/a confession of a violation of the law requiring YSD to give Notice of Security Breaches of Personal Information, which exposes YSD to liability from those whose information YSD had already released, *et al.*, (See, RCW 42.56.590/WAC 44-14-04003, *et al.*,) (CP 133/27,) and that;

C. YSD had legally/effectively waived claiming any exemption of the documents it *already* released (CP 135/141) and those to be released (See, *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-10 (2011) where lack of objection (as is the case with YSD),) YSD has waived (common law standard, (CP 135-36) claiming an exemption.

Mr. Magee's Response, piercing both YSD's pleadings and affidavits and following the law that applied to the judicially admitted facts (*i.e.*, facts removed by YSD from

contention, (See footnotes 2 & 5 herein) moved that a reasonable mind could only conclude, and requested that the trial Court rule that:

1. YSD was without standing to bring its Complaint/Motion, and that it was a frivolous action (CP 142,) and that;
2. YSD waived claiming any exemption or to deny Mr. Magee's request (CP 142,) and that;
3. YSD's frivolous/scurrilous action against Mr. Magee was nothing more than a self-admission and confession and attempt to wrongly/deceptively, influence and recruit the trial Court to provide a meritless avoidance/shield from the legal liability; and because YSD knowingly, voluntarily and intelligently and with the assistance of counsel and a Public Records Officer, created liability to those whose documents/information YSD admitted were already/would be released under Chapter 42.56 RCW – Public Records Act, YSD had violated the law and was to be enjoined from this matter (CP 143,) and that Mr. Magee's Counter/Cross Motion for Summary Judgment be granted and that it should be Ordered that:

- A. YSD's *Motion* should be denied and Mr. Magee's Counter/Cross-Motion should be granted (CP 143,) and that;
- B. Sanctions be imposed against YSD and in favor of Mr. Magee for YSD's Complaint/*Motion* being frivolous and without a basis in law/fact (CP 143,) and that;
- C. All Attorney's fees, costs, expenses, *et al.*, and allowable and/or as provided for by law (*e.g.*, RCW 42.56.550(4) as prevailing party,) be awarded to Mr. Magee (CP 143/123-25,) and that;
- D. YSD be ordered to secure any/all documents of any kind whatsoever related in any way-shape-form to this matter and as admitted to being in existence by YSD (CP 70,) and YSD be enjoined from any further contact/control over the documents in question, and the documents be seized and filed under seal in this matter and kept secure by the Court (CP 143,) and that;
- E. That Mr. Magee, as an attorney and responsible officer of the Court, and requestor and safe-keeper of the documents, (and with YSD enjoined,) be appointed and given permission and authority by the Court to have access to and permission to

contact those people who have been adversely affected by the already released documents with any/all expense associated with doing so, to be prospectively paid for by YSD (CP 144.)

YSD's pernicious, frivolous and vexing/annoying action - and judicial admissions<sup>2</sup> that it had released hundreds of documents containing personal information of individuals it subjected to an unlawful pre-employment drug test<sup>3</sup> (including the results of the drug testing identified by a person's name) - placed the trial Court in the highly unenviable position of having to struggle between either;

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<sup>2</sup> Under *Mukilteo Ret. Apts. v. Investors*, 176 Wn.App. 244 (2013) the Court, (quoting Justice Madsen,) states:

This admission is a judicial admission and as such: . . . judicial admissions within a defendant's answer "have been defined as 'stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact'" Such admissions are "'proof possessing the highest probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them.'"

*Mukilteo Ret. Apts. v. Investors*, 176 Wn.App. 244, 256, 310 P.3d 814 (2013) (footnote 8) (internal citations omitted)

<sup>3</sup> See; *Robinson v. City of Seattle*, 102 Wn.App. 795; 10 P.3d 452; 2000 Wash. App. LEXIS 1906; 16 I.E.R. Cas. (BLA) 1405; 96 A.L.R. 5<sup>th</sup> (2000), *aff'd sub nom, Blomstrom v. Tripp*, 189 Wn.2d 379; 402 P.3d 831 (2017)

1. Granting YSD's frivolous/vexing *Motion* thereby preventing the release of more documents and YSD creating more innocent victims of what YSD had already done<sup>4</sup>, or;

2. Grant Mr. Magee's Responsive/Counter/Cross, pleading/affidavit-piercing, Response, consistent with and as the facts/law required, and subject YSD, and its officials to, at the very least, *embarrassment*, whereas as a matter of law, *e.g.*:

. . . Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. . .

RCW 42.56.550(3)

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<sup>4</sup> "THE COURT: . . . But there's another consideration that is potentially the school district, if the school district released documents that it should have claimed as exempt, [but, in fact, did not] potentially it [YSD] might have liability to the people named in those documents. It certainly may, theoretically at least, prejudice somehow those applicants. And here's why the exemption – the waive of the exemption shouldn't apply because the people who would be harmed by that are the people who should have had the benefit of the exemption. . . ." (CP 33) (emphasis added)

"THE COURT: . . . And, again, the people who would be hurt if somehow disclosure was forced, would be the innocent people who had applied for work and had the drug testing . . . they're – they're innocent people. . . ." (CP 34) (emphasis added)

"THE COURT: I -- I understand what you're [Mr. Magee] saying, you're saying that they [YSD] may have violated the rights of the other people [those whose documents and identities YSD already released] and they [YSD] may have legal obligations at this point. Fine. But I don't think you have standing to raise those issues on behalf of the people who may have been harmed. . . ." (CP 43) (emphasis added)

"THE COURT: -- what the affect of the release that has occurred is something that's between YSD and the people whose information was released." (CP 45) (emphasis added)

It is respectfully submitted, that upon *de novo* review that it is correct that the trial Court erred by;

1. Granting YSD's *Motion*; and that the trial Courts' finding and Order(s) should be reversed and/or reversed and remanded with instructions to do so, and;

2. Mr. Magee's pleading-piercing Response-Counter/Cross Motion be granted in full. Mr. Magee, furthermore, respectfully requests and moves that pursuant to RAP 18.1/Title 14 - Costs, *et al.*, that his attorney's fees and costs for this appeal be granted, and that pursuant to RAP 11.4, *et al.*, that oral argument be granted.

### III STANDARD OF REVIEW

It is respectfully submitted that:

#### A. Frivolous Action

The decision to impose sanctions under CR 11 [RCW 4.84.185, *et al.*] is vested within the sound discretion of the trial court. *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 946 P.2d 1235 (1997). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failing to

apply the correct rule of law is an abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 275, 45 P.3d 541 (2002) (Sanders, J., dissenting).

And that:

CR 11(a).

If a party violates CR 11, the court may impose an appropriate sanction, which may include reasonable attorney fees and expenses. CR 11(a); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 417, 157 P.3d 431 (2007). The fact that a party's action fails on the merits is by no means dispositive of the question of CR 11 sanctions. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). The court applies an objective standard to determine “whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.” *Id.*; *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (*Biggs II*).

And that:

As with the imposition of sanctions under CR 11, an award of attorney fees under RCW 4.84.185 lies within the sound discretion of the trial court. We do not disturb its decision absent a showing of an abuse of that discretion. *Tiger Oil*, 88 Wn. App. at 937-38.

An action is frivolous if it “cannot be supported by any rational argument on the law or facts.” *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82, review denied, 113 Wn.2d 1001 (1989). As with CR 11, a trial court is not required to find an improper purpose under RCW 4.84.185 before awarding fees. RCW 4.84.185; see also *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 311, 202 P.3d 1024 (2009) (“Nothing in [RCW 4.84.185] requires a court to find that

the action was brought in bad faith or for purposes of delay or harassment.”). It is enough that the action is not supported by any rational argument and is advanced without reasonable cause.

*Eller v. E. Sprague Motors & R.V. 's, Inc.*, 159 Wn.App. 180, at 189, 190, 191, 191-2; 244 P.3d 447; 2010 Wash. App. Lexis 2856 (2010) (emphasis added)

## B. SUMMARY JUDGMENT

This court reviews a summary judgment order *de novo*, engaging in the same inquiry as the trial court. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 458, 13 P.3d 1065 (2000). Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). This court views all facts and reasonable inferences in the light most favorable to the nonmoving party. *SentinelC3*, 181 Wn.2d at 140. Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Id.* (quoting *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000)).

When reviewing a civil case in which the standard of proof is clear, cogent, and convincing evidence, this court ““must view the evidence presented through the prism of the substantive evidentiary burden.”” *Woody v. Stapp*, 146 Wn. App. 16, 22,

189 P.3d 807 (2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)); see also *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 973, 948 P.2d 1264 (1997). The burden of proof for negligent misrepresentation claims is clear, cogent, and convincing evidence. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002). Thus, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported its negligent misrepresentation claims with clear, cogent, and convincing evidence. See *Woody*, 146 Wn.App. at 22.

*RockRock Grp., LLC v. Value Logic, LLC*, 194 Wn.App. 904, 380 P.3d 545, 550 (2016)

#### IV ASSIGNMENTS OF ERROR

1. Did the trial Court err as a matter of law in granting/issuing an Order(s)/Judgment(s) (CP 208-210) granting YSD's Motion and finding that there are no material facts in dispute and Denying/not considering Mr. Magee's Response/Counter/Cross Motion? – YES.

V  
STATEMENT OF THE CASE

A.

Frivolous Lawsuit/Action

*What did Appellant do that suit could be brought against him?*

YSD, with the assistance of counsel and a Public Records Officer in place, released documents and information to Mr. Magee then only *afterwards*, (and beyond the legal time-frame to do so,) did YSD figure out that in doing so, created for itself (YSD) *per se* legal liability under the law to those individuals whose information it in fact *already* released and was to release.

In a scurrilous attempt to escape that truth and legal responsibility to the victims of its wrongdoings, from whole cloth, YSD fabricated and brought a frivolous/vexing/annoying, and without a basis in law or fact, lawsuit against Mr. Magee!

B.

Counter/Cross, Pleading/Affidavit Piercing Response

Mr. Magee, on the other hand, before-during-after his PRA request acted with an overt abundance of

caution/professional and ethical practice, and timely and properly made a PRA request of the State agency, YSD. After clarification and the resolution of any confusion/requirement *dispute* as to what Mr. Magee was requesting and whether it could be produced, YSD proceeded to identify the documents requested and invited Mr. Magee to retrieve/have delivered to Mr. Magee, the documents. (CP 70)

In good-faith, and at Mr. Magee's time and expense, (CP 123-25,) Mr. Magee responded in kind to YSD's (with the assistance of counsel's) (CP 70) invitation and on three separate cross-country travelling, pre-planned (in conjunction with YSD's office(s)) occasions, (CP 26) Mr. Magee scheduled, prepared and calendared three separate cross-state journeys to have YSD present him with the documents, whereby Mr. Magee was provided YSD's office's copying facility, and copied and paid for the documents.

In good-faith, Mr. Magee hereby declares that those documents and the names, and content/information contained in those documents have remained in his office.

Only afterward – afterward - did YSD realize, and has judicially admitted (See footnotes 2 & 5 herein,) that the release of the documents it knowingly, voluntarily, and intelligently, and with the assistance of counsel and Public Records Officer, freely released (and security thereof breached) and accepted payment for were those that the law, necessarily required YSD to give notice before their release to those whose information was contained therein, and that by in fact releasing and breaching the security thereof the documents, incurred legal liability to the innocent victims (footnote 4, *supra*,) of those people whose information YSD breached/disclosed.

Instead of confessing their sin(s), and taking responsibility for their wrongdoing, YSD sought to attempt recruiting a court of law to provide YSD with a declaratory order that only could at best, *pretend* to shield/cover-up YSD/the State, from their legal responsibilities/liabilities (which remain in existence) by conjuring-up an otherwise frivolous/vexing/annoying/scurrilous *lawsuit* with no basis in fact or law, naming Mr. Magee - a qualified PRA requestor who

had no dispute of any kind with YSD arising from his PRA request - as a Defendant in the herein underlying, so-to-speak, *action*.

Reserving all rights, *et al.*, timely and properly and lawfully, Mr. Magee responded accordingly to YSD's Complaint/Motion for Summary Judgment brought by YSD, and based on the judicially admitted facts (See footnotes 2 & 5 herein) of YSD, fully pierced YSD's action and revealed it for what it was/is, thereby placing the trial court in the unenviable position of either protecting against further harm against citizens of Washington by YSD, or holding the State liable for its admitted wrongdoing. The trial Court, erring as a matter of law, however - untenably as a matter of law and fact - nevertheless, sided with YSD, and granted its *Motion*.

It is respectfully submitted that Appellant, Mr. Magee's Response to YSD's *Motion* based on the undisputed/judicially admitted facts, (See footnotes 2 & 5 herein) was compelling and correct as a matter of law, and that YSD's *Motion* should have been denied, and Appellant Mr. Magee's Responsive

pleading be granted, and that Mr. Magee's attorney's fees/costs should have been awarded (CP 123-25) and sanctions imposed against YSD in favor of Mr. Magee.

It is, accordingly, so requested that upon *de novo* review, this Court find as such, reverse the trial Court, and grant Mr. Magee's Responsive pleading/Motion, and/or remand this matter to the trial court with instructions to do so.

## VI SUMMARY OF ARGUMENT

From the outset, Mr. Magee Responded (CP 126-170) to YSD's *Motion* by pointing out/piercing and competently argued that:

### A. Frivolous/Sanctionable

YSD's Motion/Suit was frivolous and without a basis in law or fact and that Mr. Magee had no (pending) dispute, real or imagined, with YSD that could provide a basis either under RCW 42.56 (Public Records Act,) or for seeking a Declaratory Judgment. (CP 126,128-132)

Mr. Magee; (a) timely and properly - and with notice to counsel for YSD (CP 151, 153-55) and to the attorney general's office (CP 156-58) – submitted a Public Records request to YSD, and; (b) YSD, knowingly, voluntarily, and intelligently and invitingly responded and produced the documents requested to date, to Mr. Magee, on three separate occasions! (CP 126) (CP 127, lines 13-19) There existed, *ergo*, no dispute/*threat* between YSD and Mr. Magee upon which YSD could stand to bring the action it did. And that;

B.

YSD Admits Wrongdoing and Liability

That the facts (judicially) admitted<sup>5</sup> by YSD, self-pierce YSD's Complaint/Motion and are the legal equivalent of Self-Reporting and/or a Confession to breaching the law regarding

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<sup>5</sup> See footnote 2, *supra*, (*Mukilteo Ret. Apts. v. Investors*, 176 Wn.App. 244 (2013) quoting Justice Madsen, stating as a matter of law that, judicial admissions are those that “have been defined as ‘stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.’” *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 893, 983 P.2d 653, 993 P.2d 900 (1999) (Madsen, J., concurring/dissenting) (quoting 2 McCormick on Evidence § 254, at 142 (John W. Strong ed., 4th ed. 1992)). Such admissions are “‘proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them.’” *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) (emphasis added) (quoting *Hill v. Fed. Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941)). Thus, it is not true, as MILP would have it, that all courts have considered a defendant's judicial admissions so easily waived.

notifying individuals of a breach of the security by YSD of the “personal information” (CP 27, line 27, citing RCW 42.56.230 (CP 28, line 28)) (See RCW 42.56.590 requiring that any agency (e.g., YSD) shall disclose any breach of the security of personal information, and WAC 44-44-14-04003 re Responsibilities of agencies in processing PRA requests and notice to affected third parties (those whose information has/had been released by YSD, and the remainder of the documents requested and those third parties statutorily based right to bring suit against and liability of YSD to them for what it has/had judicially admitted to doing,) and that;

C.

YSD waived claiming any exemption precluding Subsequent Action

*Any exemption that YSD, after-the-fact -and outside the legal time-frame to do so - was now claiming is/was, as a matter of law, a fallacy, and waived, whereby YSD, per RCW 42.56.520(1)(e) (CP 135-6) (a) never objected, but rather, willingly, knowingly, voluntarily, intelligently, and with the assistance of counsel, invited Mr. Magee to receive the*

documents in question, and YSD; (b) did not, within five-days deny the release of the documents to Mr. Magee (CP 135,) and that; (c) YSD, *per Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-10 (2011), *et al.*, (re “waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. . . .” (CP 135)) waived any right to prevent the specific production of documents to Mr. Magee.

## VII ARGUMENT

### PREAMBLE

Appellant, Mr. Magee, and submitting this appeal to be accepted as timely and proper seeking *de novo* review of a Motion for Summary Judgment; requests that the entire record of the trial Court (CP 1-235) be incorporated by reference, and specifically, that YSD’s Motion and affidavits/declaration/memoranda (CP 16-122) and the trial Court’s Order(s) (CP 207-210,) and Appellant Mr. Magee’s Response (CP 126-167) provide the basis for *de novo* review

establishing that YSD's Motion should have been denied, and that Mr. Magee's requests/Response be granted. Mr. Magee, furthermore, respectfully submits and requests that the above sections herein (I-VI) be incorporated to this section:

Law: Under *Platts v. Platts*, 73 Wn.2d 434, 438 P.2d 867, 1968 Wash. LEXIS 649, 31 A.L.R.3d 1413 (1968), and quoting *Reed v. Streib*, 65 Wn.2d 700, 706, 399 P.2d 338 (1965) therein citing, *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605, 1960 Wash. LEXIS 554 (1960) (See footnote 1, *supra*,) the Supreme Court states explicitly that, "The purpose of the summary judgment rule is to permit the court to pierce such formal allegations of facts in pleadings when it appears there are no genuine issues." (emphasis added)

As applicable here, the Supreme Court's long standing decision, (*e.g.*, *stare decisis*,) is that the undisputed facts (here, judicially admitted facts of YSD, (See footnotes 2 & 5 herein), and the inescapable conclusions of law therefrom, pierce YSD's Motion's *arguments/issues*, and that YSD's Motion's *arguments/issues*, are, as such (*i.e.*, pierced,) to be, properly,

disregarded, and that it is proper, accordingly, that Mr. Magee's Responsive pleading be acknowledged and acted on and granted, as is requested on this appeal.

Law; Judicial Admissions: *Under Mukilteo Ret. Apts. v. Investors*, 176 Wn.App. 244 (2013) the Court, (quoting Justice Madsen,) states:

This admission is a judicial admission and as such: . . . judicial admissions within a defendant's answer "have been defined as 'stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact'" Such admissions are "'proof possessing the highest probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them."

*Mukilteo Ret. Apts. v. Investors*, 176 Wn.App. 244, 256, 310 P.3d 814 (2013) (footnote 8) (internal citations omitted) (See footnote 2, 5, *supra*)

Herein, Mr. Magee's Response is based on the already (*ergo*) judicially admitted (See footnotes 2 & 5 herein, and *Mukilteo Ret. Apts. v. Investors, supra*) undisputable facts of YSD, removing those facts from dispute and allowing the piercing of YSD's Complaint/Motion & Affidavits:

A.  
Frivolous lawsuit

YSD judicially admits that it received a PRA request from Mr. Magee and that any dispute, real or imagined, was resolved and any litigation between Mr. Magee and YSD related to his timely and proper request had been avoided and then, without objection, began releasing hundreds of documents to Mr. Magee, as requested (CP 24-26). If YSD had any dispute with Mr. Magee as to whether the documents in question were exempt and/or their release was to be denied, it failed to timely and/or properly lawfully act, and if it had “denied” Mr. Magee’s request, it is only Mr. Magee who then could initiate an action against the state/YSD for not releasing the documents; RCW 42.56.520, states; Law:

Prompt responses required. (1) Responses to requests for public records shall be made promptly by agencies, (*e.g.*, YSD). . . . within five business days of receiving a public record request, an agency, [YSD] must respond in one of the ways provided in this subsection (1): . . . (e) Denying the public record request. . . . (4) Denials of requests must be accompanied by a written statement of the specific reasons therefor. . . .

(CP 130-31) (emphasis added)

At the time, and as judicially admitted by YSD, YSD NEVER denied, for any reason, much less promptly (within five business days) Mr. Magee's request. If it had, it is only the requestor (Mr. Magee) who may seek judicial review, *i.e.*, take action against YSD (See RCW 42.56.550 - Judicial review of agency actions.) With no dispute in question between Mr. Magee and YSD (YSD was acting on and releasing documents he requested) *i.e.*, YSD had not denied Mr. Magee's request, there is no basis in law or fact to take action against Mr. Magee rendering this action frivolous and sanctions should be imposed in favor of Mr. Magee.

B.  
Summary Judgment

This matter revolves around a Public Records Act request made by Mr. Magee to the state agency, Appellee, YSD, that, with any/all *dispute(s)* resolved, YSD judicially admits that it knowingly, voluntarily, intelligently, and with the assistance of counsel (CP 70) released hundreds of documents that contained "personal information." (CP 25/27)

YSD's *conclusion/argument* is that it can fabricate a dispute after the time to deny release had expired and knowingly, voluntarily, and intelligently, and with the assistance of counsel, (CP 70) and a Public Records Officer, release documents, and *well afterwards* then seek an exemption of - and for having already released documents YSD owns containing, as judicially admitted, (See footnotes 2 & 5 herein, and *Mukilteo, supra*) personal information. This is an absurdity in light of the law, *id est*:

Law: Under RCW 42.56.590, (and as pleaded by Mr. Magee,) it states:

(1)(a) Any agency that owns or licenses data that includes personal information **shall** disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of this state whose personal information was or is reasonably believed to have been, acquired by an unauthorized person [e.g., Requestor, Mr. Magee] and the personal information was not secured. . . . (12)(a) Any individual injured by a violation of this section may institute civil action to recover damages. (b) Any agency that violates, proposed to violate, or has violated this section may be enjoined.

RCW 42.56.590 (emphasis added) (CP 133)

And:

Under the Washington Administrative Code (WAC) WAC 44-14-04003 – Responsibilities of agencies in processing requests, states:

(12) Notice to affected third parties. [those whose information has/had been released by YSD, and the remainder whose documents have been requested] . . . The third party can file an action to obtain an injunction to present an agency from disclosing it, . . . Before sending notice, an agency should have a reasonable belief that the record is arguably exempt (*e.g.*, as argued by YSD in their Motion) . . . the act [PRA] provides that before releasing a record an agency may, at its “option,” provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW 42.56.540 [See RCW 42.56.590, *supra*, herein, it is required by law] This would include all of those whose identity could be reasonably ascertained in the record and who might have a reason to seek to prevent the release of the record.

WAC 44-14-04003(12) (internal citations/footnotes omitted) (emphasis added) (See RCW 42.56.570) (CP 133-34)

YSD sought by way of a frivolous action, an Order exempting release of documents it (i) had already released, and; (ii) was in the process of releasing.

The law that applies (*supra*, and as pleaded) to the state agency, YSD, is that upon Mr. Magee’s request, and that if YSD is to take the position that the documents in question

contain personal information, is that; (i) YSD is to give notice to those whose documents Mr. Magee requested, and; (ii) to notify those people whose documents/personal information, and security thereof, has been breached by YSD.

Accordingly, and with the judicially admitted/undisputed facts (See footnotes 2 & 5 herein, and *Mukilteo, supra*) stated by YSD, YSD's pleading is pierced so that its Motion is/was to be denied, and the law (*supra*) and liability thereby, imposed upon them.

#### Waiver

YSD judicially admits per its Memorandum in Support of Plaintiff's Motion for Declaratory Ruling and Summary Judgment, dated August 26, 2019 (CP 30,) that it requested, "summary judgment and a declaratory ruling that records relating to pre-employment drug screens by applicants for employment with YSD are exempt from production pursuant to RCW 42.56.250(2) in response to public records request (PRA Chapter 42.56 RCW) submitted by the defendant [Mr. Magee] on November 27, 2018." (CP 23) YSD then judicially admits

that “**D. YSD begins to produce records for Mr. Magee’s review.**” (CP 25,) and also judicially admits (See footnotes 2 & 5 herein, and *Mukilteo, supra*) that it invited Mr. Magee to come to YSD offices and receive the documents on March 5, 2019, April 19, 2019, and July 10, 2019. (CP 26)

YSD then judicially admits that it was not until April 11, 2019 that FOR THE FIRST TIME, some 97 business days AFTER November 27, 2018, and after YSD had knowingly, voluntarily, intelligently, with the assistance of counsel, (CP 70) and a Public Records Officer had released hundreds of documents to Mr. Magee on March 5, 2019, and then continued to release documents to Mr. Magee on April 19, 2019, and July 10, 2019, that it’s “position that pre-employment drug screening records were exempt from their production in their entirety pursuant to RCW 42.56.250(2).” (CP 26, lines 18-20)

Law: The Supreme Court of the State of Washington, under *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-410 (2011), re PRA waiver, states:

. . . The PRA itself does not provide for waiver of a claimed exemption. Instead, the PRA mandates that the state and local

agencies produce all public records upon request, unless the record falls within a specific PRA exemption or other statutory exemption. RCW 42.56.070(1). . .

. . . Finding no statutory authority for appellants' waiver argument, we turn to the common law doctrine of waiver.

. . . A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of relinquishment of such right. It may result from an express agreement [as was done by YSD in this case] or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego [sic] some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such a right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them. **The failure to object to a single public records request is only a relinquishment of the right to prevent that specific production.**

*Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-410 (2011) (emphasis added) (CP 135-6)

On November 28, 2018, (well before the documents were released *en masse*) YSD expressly acknowledged/judicially admitted (See footnotes 2 & 5 herein, and *Mukilteo, supra*) that documents requested under the PRA may be exempt from production, “The District’s initial estimate is that records, if existing and not exempt, may be available as soon as 02/28/19.”

(CP 54) and, additionally, acknowledges/judicially admits that, “. . . school districts cannot disclose personally identifying information from education records without written consent, unless an exception applies.” (CP 54) YSD knew of both its actual or constructive knowledge of the right to claim an exemption – and did not.

At and before YSD knowingly, voluntarily, and intelligently and with the assistance of counsel (CP 70) and a Public Records Officer released hundreds of documents to Mr. Magee, it knew it could claim an exemption, and did not, becoming, then, legally liable for the release of documents that contained personal identifying information (PII) AND JUDICIALLY ADMITS IT RELEASED THE DOCUMENTS ANYWAY (CP 26, *supra*).

YSD’s Motion invokes the PRA/RCW 42.56 multiple times, making it applicable to itself, and when applied (See 42.56.520, *et al.*,) necessarily leaves but one reasoned conclusion. YSD waived claiming an exemption.

Accordingly, YSD's Motion should be denied, and the trial Courts granting should be reversed and Mr. Magee's Response be granted and/or this matter be remanded with instructions to do so.

## VIII CONCLUSION

1. Appellant, Mr. Magee, as a Requestor, engaged - with an abundance of professionalism and ethics - YSD by making a Public Records Act request (PRA RCW Chapter 42.56.)

2. YSD, knowingly, voluntarily, intelligently, with the assistance of counsel (CP 70) and a Public Records Officer, willingly, freely, and without objection - and by inviting Mr. Magee to calendar, secure, and at his time and expense, travel to YSD's offices on three separate, successive occasions, released hundreds of documents to Mr. Magee which he paid for.

3. Only after some 97 business days after inviting Mr. Magee to come to their office, and without objection, did YSD FOR THE FIRST TIME then suggest that it objected to the documents release (and further release,) and without a basis in

law or fact, bring suit against Mr. Magee seeking a declaratory order permitting YSD to withhold production of already released documents? How could this be? – it is factually impossible to not release documents already released! What, as a matter of fact and law did the Requestor (Appellant, Mr. Magee) do that could subject him to this (or any) lawsuit? (NOTHING.) Mr. Magee did nothing other than timely, professionally, and properly make a PRA request that YSD responded to and provided the records.

4. YSD's lawsuit against Mr. Magee is/was frivolous and YSD should be sanctioned for bringing it, and it's actions thereby, and upon *de novo* examination, and upon Mr. Magee's Response, should be recognized as timely and properly piercing YSD's pleadings to the effect that they are self-admissions/confessions to legal wrongdoing for which they have legal liability, and whose arguments for claiming an exemption are undermined by the law regarding waiving the claim of an exemption.

Accordingly, this appeal is respectfully submitted by Appellant, Mr. Andrew L. Magee to be timely and proper seeking *de novo* review and reversal and/or remand with instructions - of the favorable ruling of the trial Court on Appellee's, Yakima School District No. 7's (YSD) Motion for Declaratory Ruling and Summary Judgment (Motion) and supporting affidavits (CP 16-122,) and resulting order(s) (CP 207-210) and Judgment(s) (CP 230-31,) et al., and – to make a finding in favor/consistent with Mr.

Magee's/Defendant/Appellant's Response to Plaintiff's Motion for Declaratory Ruling and Summary Judgment and CR 56(b) Counter-Motion for Summary Judgment and for Sanctions Costs and Attorney's Fees (Response.) (CP 123-25/126-167), and that YSD is to be ordered that:

1. YSD was without standing to bring its Complaint/Motion, and that it was a frivolous action (CP 142,) and sanctions be imposed, and that;
2. YSD waived claiming any exemption or to deny Mr. Magee's request (CP 142,) and that;

3. YSD's frivolous/scurrilous action against Mr. Magee was nothing more than a self-admission and confession and attempt to wrongly/deceptively, influence and recruit the trial Court to provide a meritless avoidance/shield from the legal liability; and because YSD knowingly, voluntarily and intelligently and with the assistance of counsel and a Public Records Officer, created liability to those whose documents/information YSD admitted were already/would be released under Chapter 42.56 RCW – Public Records Act, YSD had violated the law and was to be enjoined from this matter (CP 143,) and that Mr. Magee's Counter/Cross Motion for Summary Judgment be granted and that it should be Ordered that:

A. YSD's Motion should be denied and Mr. Magee's Counter/Cross-Motion should be granted (CP 143,) and that;

B. Sanctions be imposed against YSD and in favor of Mr. Magee for YSD's Complaint/Motion being frivolous and without a basis in law/fact (CP 143,) and that;

C. All Attorney's fees, costs, expenses, *et al.*, and allowable and/or as provided for by law (e.g., RCW 42.56.550(4) as

prevailing party, *et al*) be awarded to Mr. Magee (CP 143/123-25,) and that;

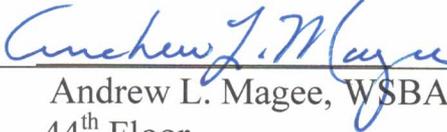
D. YSD be ordered to secure any/all documents of any kind whatsoever related in any way-shape-form to this matter and as admitted to being in existence by YSD (CP 70,) and YSD be enjoined from any further contact/control over the documents in question, and the documents be seized and filed under seal in this matter and kept secure by the Court (CP 143,) and that;

E. That Mr. Magee, as an attorney and responsible officer of the Court, and requestor and safe-keeper of the documents, (and with YSD enjoined,) be appointed and given permission and authority by the Court to have access to and permission to contact those people who have been adversely affected by the already released documents with any/all expense associated with doing so, to be prospectively paid for by YSD (CP 144.)

Mr. Magee, furthermore, respectfully requests that in addition to his attorney's fees/costs pled in the trial Court (CP 123-25,) that the same be awarded on this appeal, and respectfully requests that this appeal be granted oral argument.

June 22, 2020

Respectfully submitted,

*Ecce Signum:*  \_\_\_\_\_  
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### CERTIFICATE OF ELECTRONIC SERVICE

I, Andrew L. Magee, attorney of record for Defendant/Appellant, Andrew L. Magee, and pursuant to the laws and penalties of perjury in the State of Washington do hereby certify that this document was electronically served/delivered to Quinn N. Plant, Esq., WSBA# 31339 June 22nd, 2020 at the following Address:

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