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Division III
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No. 375056

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

ANDREW L. MAGEE,

Appellant,

v.

YAKIMA SCHOOL DISTRICT NO. 7,

Respondent.

BRIEF OF RESPONDENT

Quinn N. Plant
WSBA #31339
Seann M. Mumford
WSBA#43853
807 N. 39th Avenue
Yakima, WA 98902
(509) 575-0313
qplant@mjbe.com
smumford@mjbe.com

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I. INTRODUCTION

This appeal involves a public records request that Andrew L. Magee (“Mr. Magee”) submitted to Yakima School District No. 7 (“YSD”) in the fall of 2018. YSD filed a declaratory action seeking a ruling on whether the requested documents were exempt from disclosure under Washington’s Public Records Act (“PRA”). Mr. Magee denied that YSD was entitled to the relief sought for various reasons.

YSD filed a motion for summary judgment maintaining that it was entitled to a declaratory ruling that the records requested by Mr. Magee were exempt from disclosure as a matter of law. Mr. Magee opposed YSD’s motion on the basis that it lacked standing to file that action and that it had waived its right to claim the requested records were exempt. Mr. Magee’s opposition memorandum included a “counter-motion for summary judgment.” That counter-motion was not noted for hearing and it merely reiterated the arguments Mr. Magee made in opposition to YSD’s motion.

The trial court granted YSD’s motion for summary judgment. In doing so, it did not rule on Mr. Magee’s counter-motion. Mr. Magee subsequently initiated this appeal.

II. COUNTER-STATEMENT OF THE ISSUES ON APPEAL

- A. Should Mr. Magee's appellate brief be stricken because it fails to comply with RAP 10.3(a)?
- B. Did the trial court err in granting YSD's motion for summary judgment?
- C. Was Mr. Magee's purported counter-motion for summary judgment properly before the trial court?
- D. Were the issues and arguments raised by Mr. Magee's purported counter motion for summary judgment rendered moot when the trial court granted YSD's motion for summary judgment?

III. COUNTER-STATEMENT OF THE CASE

A. Mr. Magee's public records request.

Mr. Magee is a lawyer from Seattle. CP 44. He represents Elizabeth Andrews in a lawsuit filed against YSD in 2017. CP 31, 36-44. On November 27, 2018, YSD received a public records request from Mr. Magee. CP 32, 46-50. That public records request sought:

.... I am requesting an opportunity to inspect or obtain copies of absolutely any/all records/recordings/video tapes or records of any kind whatsoever associated with or related to the and/or any/all drug testing program(s) imposed upon and/or any other prospective and/or employee of YSD, and that/those made upon such persons – to include/but not limited to – in conjunction with Yakima Worker Care.

CP 47, 49.

In response to this request, YSD sent a 5-day letter to Mr. Magee on November 28, 2018. CP 32, 54. The letter indicated that YSD would provide Mr. Magee with responsive records as soon as February 28, 2019.

CP 54.

B. Mr. Magee's clarification of request and threat of litigation.

On December 5, 2018, Mr. Magee sent YSD's public records coordinator an email stating that: "It is our position that your response is wholly insufficient and not in compliance with the law, and, as I believe was mentioned, will be the basis for taking legal action seeking sanctions to be imposed on your/YSD's lack of response in providing access to the documents described." CP 32, 56.

In that email, Mr. Magee also clarified the scope of his public records request:

. . . I have attached a copy of a form that is used, that among others, is that which we request access to in the capacity described in our request, that is to say, but not limited to, we need to be provided to access to these documents (the "Acknowledgmenet [sic] and Understanding of Drug Screen and/or Physical Process forms) for the entirety of their use (and/or any other form) related, but not limited to, the drug testing program indicated therein.

CP 56.

On January 29, 2019, YSD's public records coordinator sent an email to Mr. Magee attached to which were copies of the records YSD felt may be responsive to his public records request. CP 32, 60-65. That email asked Mr. Magee to confirm that YSD had provided him with the

records he was seeking, or, if not, to clarify the records he was seeking.

CP 60.

C. Mr. Magee's additional clarification of his request.

On February 3, 2019, Mr. Magee sent an email to YSD clarifying what documents he was seeking through his public records request. CP 32, 33, 67. According to Mr. Magee, it was his understanding that "when a person is processed to become an employee, they are given a form with their name filled out on it." CP 67. According to Mr. Magee, what he was requesting was "to review the copy of every single person's form that was subject to this drug testing program that documents (a) that they were subject to the test, and (b) any disposition, (or not) taken against any person whatsoever who has been subject to the test." CP 67.

D. YSD's response to Mr. Magee's further clarified public records request.

Based upon this clarification, YSD was able to ascertain that Mr. Magee's request encompassed two types of records: 1) a form entitled "Acknowledgment and Understanding of Drug Screen and/or Physical Process" completed by applicants for employment with YSD, and 2) records that contain the results of drug screenings performed as part of YSD's employment application progress. CP 56, 57, 67.

Those records are maintained in files designated by YSD as “HIPAA files.” CP 33. These HIPAA files are separate and distinct from employee personnel files. CP 33. HIPAA files contain confidential information, including medical records, of YSD employees and applicants for employment with YSD. CP 33. YSD maintains a separate HIPAA file for each of its current employees. CP 33. Around the time of Mr. Magee’s public records request YSD had approximately 2,000 employees. CP 33. Additionally, YSD also maintains HIPAA files for several dozen people who applied for employment with YSD but are not current employees. CP 33.

On February 15, 2019, YSD notified Mr. Magee that it had assembled an installment of records for his review. CP 33, 70. In a follow-up email on March 1, 2019, YSD informed Mr. Magee that it would respond to his request in 33 installments. CP 33, 72. Mr. Magee inspected the first installment of records on March 5, 2019, and requested 277 pages of copies. CP 33, 76.

On April 11, 2019, YSD’s legal counsel sent Mr. Magee a letter informing him that YSD believed the records he was requesting were part of the application process relating to public employment with YSD and, as such, were “exempt from production in their entirety pursuant to RCW 42.56.250(2).” CP 86, 89, 90.

On April 19, 2019, Mr. Magee inspected a second installment of records. CP 33. He inspected a third installment of records on July 10, 2019. CP 33, 34, 78-85. Mr. Magee requested copies of 327 pages from the second installment of records, and 310 pages of records from the third installment. CP 84, 85.

In a May 7, 2019, letter from its legal counsel to Mr. Magee, YSD reiterated its position that “the records at issue may be withheld in their entirety pursuant to” the legal authority cited in the previous letter. CP 87, 102. That letter asked if Mr. Magee disagreed with YSD’s position and, if so, the basis for such disagreement. CP 102. YSD’s lawyer also informed Mr. Magee that while YSD intended to continue to provide Mr. Magee with installments of responsive records, it may also seek a declaratory judgment “as to whether these records may be withheld in their entirety.” CP 102.

Mr. Magee did not respond to that letter, and on June 4, 2019, YSD’s lawyer sent a follow-up letter asking whether Mr. Magee agreed or disagreed with YSD’s position that the documents requested by Mr. Magee are exempt from production under RCW 42.56.250(2). CP 87, 104. That letter informed Mr. Magee that if failed to respond to the letter, or if he disagreed with the position being taken by YSD regarding the

requested records, then YSD would seek a declaratory judgment on the issue. CP 104.

E. Proceedings before the trial court.

Mr. Magee did not respond to YSD's counsel's June 4, 2019, letter, and on June 18, 2019, YSD filed a complaint for declaratory relief against Mr. Magee in Yakima County Superior Court. CP 1-7. The complaint asked the trial court to enter a declaratory ruling the records sought by Mr. Magee could be withheld in their entirety pursuant to RCW 42.56.250(2). CP 3-7. Mr. Magee filed an answer to the complaint in which he admitted to the factual allegations of the complaint, but then went on to assert various reasons why YSD was not entitled to the relief requested. CP 10-12.

On August 28, 2019, YSD filed a motion for summary judgment asking the trial court to find that, as a matter of law, the records sought by Mr. Magee's public records request could be withheld in their entirety. CP 16. Mr. Magee opposed YSD's motion by claiming that YSD did not have standing to seek the declaratory relief requested, and that YSD had waived its right to seek the relief requested by allowing him to previously inspect and copy some of the records responsive to his request. CP 128-132, 135-140.

Mr. Magee's opposition memorandum also alleged that allowing him to review and copy some of the records responsive to his records

request constituted a security breach by YSD for purposes of RCW 42.56.590. CP 133, 134. Mr. Magee claimed that YSD had not notified the individuals effected by this alleged security breach. CP 133, 134. However, the opposition memorandum did not actually assert that these alleged improper actions by YSD constituted a basis for denying its motion for summary judgment. CP 133, 134.

Mr. Magee's opposition memorandum purported to include a "counter-motion for summary judgment" against YSD that parroted his reasons for opposing YSD's motion. CP 126, 140-143. Mr. Magee did not note his counter-motion for summary judgment for hearing as required by CR 56(c) and LCR 56(e)(1). CP 178.

YSD's motion for summary judgment was heard on October 23, 2019. CP 119, 120, 190-203. During that hearing, the trial court agreed with YSD that the records Mr. Magee was requesting constituted part of an application for public employment and were therefore exempt from production under RCW 42.56.250(2). CP 197, 198. On November 22, 2019, the trial court entered a written order granting YSD's motion for summary judgment. CP 207-10.

Also on November 22, 2019, Mr. Magee filed his notice of appeal of the trial court's decision, which sought direct review by the Supreme Court

of Washington. CP 204-206. That appeal was subsequently transferred to this Court. *See* CP 232-235.

IV. ARGUMENT

A. YSD moves the Court for an order striking Mr. Magee's brief because it fails to comply with RAP 10.3.

RAP 10.3(a) outlines the sections an appellate brief is required to include, and directs that those sections be organized in a specific order. If a party submits a brief that does not comply with RAP 10.3(a) that brief may be stricken by the Court on its own initiative or pursuant to a motion by another party. RAP 10.7. The content of Mr. Magee's brief fails to comply with RAP 10.3(a) in various ways. As such, YSD asks the Court to strike his brief pursuant to RAP 10.7.

i. Mr. Magee's brief includes an unauthorized preamble and an introduction section that does not comply with the RAP.

Mr. Magee's brief also contains a preamble section, which is not authorized under RAP 10.3(a), and an introduction section. Br. 1, 2. The preamble consists of a one page run-on sentence that contains a confusing description of the relief he is seeking in this appeal. Br. 1.

RAP 10.3(a)(2) authorizes the inclusion of an optional introduction section in a brief. Any such introduction should be a concise statement of

the issues presented by the appeal and the related facts. RAP 10.3(a)(3). The introduction to Mr. Magee's brief, rather than being concise, is over 9 pages long. Br. 2-11. Those pages contain hyperbolic statements and argument rather than an introduction to the issues presented by this appeal. Br. 2-11. For instance, Mr. Magee accuses YSD of concocting "from whole cloth" and fabricating the dispute between it and Mr. Magee that served as the basis for YSD's request for declaratory relief. Br. 4. Mr. Magee further alleges YSD's filing of a declaratory action resulted in some type of "impossible distortion." Br. 4. Mr. Magee also characterizes the declaratory action commenced by YSD as "pernicious, frivolous and vexing/annoying," in spite of the fact that the trial court granted YSD summary judgment in that action. Br. 9; CP 207-210. These are merely illustrative examples of the content and tone of the introduction section of Mr. Magee's brief. Similar examples can be found throughout that section. Br. 2-11.

ii. Mr. Magee's statement of the case section is improper.

Under RAP 10.3(a)(5), the statement of the case portion of a brief is supposed to consist of "A fair statement of the facts and procedures relevant to the issues presented for review, without argument." Each factual statement must be supported by a citation to the record on appeal. *Id.* The purpose of this rule is to enable the court and opposing counsel to

efficiently and expeditiously review the accuracy of the factual statements made in the briefs. *Litho Color, Inc. v. Pac. Emp'rs Ins. Co.*, 98 Wn. App. 286, 305 (1999). The “Statement of the Case” portion of Mr. Magee’s brief fails to comply with RAP 10.3(a)(5) from the very beginning.

The first subsection in that portion of the brief is entitled “Frivolous Lawsuit/Action.” Br. 15. In that subsection Mr. Magee makes sweeping allegations regarding illegal, dishonest, scurrilous, frivolous, vexing, and annoying acts committed by YSD. Br. 15. This tone and tenor continues throughout the remainder of this section.

Mr. Magee’s brief goes on to outline his own purported laudatory actions relating to his public records request, all while continuing to make argumentative attacks regarding the alleged actions of YSD. Br. 15-19. For example, Mr. Magee refers to his own conduct as being overly cautious, professional, ethical, timely, proper, and being done in good faith. Br. 16. This can be contrasted against the alleged sinful, conjuring, illegal, frivolous, vexing, annoying, scurrilous actions of YSD. Br. 17, 18.

In total, the “Statement of the Case” portion of Mr. Magee’s brief consists of over 4 pages of argumentative assertions, almost none of which are supported by references to the appellate record. Br. 15-19. This is completely contrary to the requirements for RAP 10.3(a)(5).

Collectively, the ways in which Mr. Magee’s brief fails to comply with the requirements of RAP 10.3(a), as outlined above, justifies striking his brief in its entirety. RAP 10.7. YSD moves the Court for an order doing just that. *Id.*

B. Standard of review.

Review of an order granting summary judgment is de novo. *Emerald Enterprises, LLC v. Clark County*, 2 Wn. App.2d 794, 802-03 (2018), *review denied*, 190 Wn.2d 1030 (2018) (quoting *Weden v. San Juan County*, 135 Wn.2d 678, 689 (1998)). Summary judgment is proper 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).

C. The trial court correctly concluded that a present and existing dispute existed between YSD and Mr. Magee for purposes of Washington’s Uninform Declaratory Judgment Act.

Washington’s Uniform Declaratory Judgment Act (“UDJA”) is codified at Ch. 7.24 RCW. Under RCW 7.24.020, “[a] person...whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.”

Before the jurisdiction of a court may be invoked under the UDJA, a justiciable controversy must exist. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814–15 (1973). A justiciable controversy is an actual, present, and existing dispute, or the mature seeds of one, which is distinguishable from a possible, dormant, hypothetical, speculative, or moot disagreement. *To–Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001). “To be justiciable, a dispute must be between parties that have genuine and opposing interests, which are direct and substantial and not merely potential, theoretical, abstract, or academic; and a judicial determination of the dispute must be final and conclusive.” *Superior Asphalt Concrete Co. Inc. v. Wash. Dept. of Lab. & Indus.*, 121 Wn. App. 601, 606 (2004)(citing *Id.*) The purpose of these requirements is to ensure the court will render a final decision on an actual dispute between opposing parties with a genuine stake in the court's decision. *To-Ro*, 144 Wn.2d at 411. If all of these elements are not present, the reviewing court steps into the prohibited area of advisory opinions. *Diversified Indus.*, 82 Wn.2d at 815.

In its order granting summary judgment, the trial court found that an actual, present, and existing dispute existed between YSD and Mr. Magee with respect to whether the documents responsive to his public records request could be withheld in their entirety. CP 208. The trial

court also found that the interests of Mr. Magee and YSD “with respect to this issue are genuine, direct, substantial and opposite. CP 208, 209.

On appeal, Mr. Magee appears to be challenging the trial court’s finding that YSD had standing to bring its declaratory action for two reasons. First, he contends that YSD did not bring the existence of the dispute to his attention until after “the time to deny release had expired.” Br. 27. This appears to be an assertion that the existence of this dispute should have been brought to his attention prior to the expiration of the 5-day period for an agency’s initial response to a public records request required by RCW 42.56.520(1). *See* Br. 26. In addition, Mr. Magee challenges this finding by the trial court on the basis that YSD had already allowed Mr. Magee to inspect and copy some of the documents responsive to his records request at the time it first brought the existence of this dispute to his attention. Br. 27. These arguments were rejected by the trial court. CP 130-132, 208, 209. The Court should affirm that decision.

- i. YSD was not required to inform Mr. Magee of its position that the records he was requesting were exempt from disclosure under the PRA in its initial 5-day response letter.**

The PRA requires an agency to provide a response to a public records request within 5 business days of receiving the request. RCW 42.56.520(1). This response may be in the form of providing the

requested records. *Id.* (a). However, there are several other types of responses that are authorized by the statute, including an acknowledgement by the agency that it has received the request and then providing a reasonable estimate of time the agency will require to respond to it. *Id.* (b)-(e). That is what YSD did in this case. CP 46-50, 52-54.

The need for additional time for an agency to respond to a public records request so that an agency can determine whether any of the requested information is exempt is appropriate under the PRA. RCW 42.56.520(2). YSD's initial response letter to Mr. Magee, dated November 28, 2018, specifically recognized the possibility that YSD may claim that the records he was requesting were exempt. CP 54. This was appropriate under the PRA. RCW 42.56.520(2).

Mr. Magee's assertion that YSD was required to notify him of any potential dispute regarding his public records request within the 5-day initial response window is contrary to the express language of the PRA, and would deprive YSD of its ability to thoroughly evaluate whether the records he requested were exempt from disclosure. *Id.*

ii. The appellate record reflects a clear and continuing dispute between Mr. Magee and YSD regarding his records request.

On December 5, 2018, in an email to YSD, Mr. Magee stated that “[I]t is our position that [YSD’s 5-day response letter] is wholly

insufficient and not in compliance with the law, and, as I believe was mentioned, *will* be the basis for taking legal action” against YSD. CP 56. This was an explicit threat by him of litigation against YSD.

YSD subsequently started a process of trying to get clarification from Mr. Magee as to the scope of his records request. CP 60-65. That process included sending Mr. Magee forms certain forms YSD felt were responsive to his request, and asking for confirmation on that point. CP 68. On February 3, 2019, Mr. Magee responded that those forms were “entirely non-responsive to [his] original request,” and also by challenging the legal basis upon which YSD’s projected response date was partially based. CP 67, 68. This email only underscored Mr. Magee’s earlier threat of litigation.

Mr. Magee makes much of the fact that YSD allowed him to review and copy responsive documents prior to commencing its declaratory action against him. According to Mr. Magee this fact demonstrates the absence of an actual dispute between the parties regarding his records request. Br. 25, 27. This assertion is contrary to the record before the Court.

Beginning in April 2019, YSD sought clarification from Mr. Magee about the application of RCW 42.56.250(2) to the pre-employment drug screening records he was requesting. CP 89-97, 102, 104. Those

efforts were reasonable and appropriate under the circumstances. Only when Mr. Magee refused to respond to these efforts did YSD seek a judicial determination of its obligations under the PRA in June 2019. *See* CP 104.

The facts in this case are similar to the situation presented to this Court in *Benton County v. Zink*, 191 Wn. App. 269 (2015). In response to a public records request from Donna Zink, Benton County took the position that it was not required by the PRA to produce records in electronic format. *Zink*, 191 Wn. App. at 274-75. Ms. Zink responded by "demanding, with thinly veiled litigation threats, electronic copies of the records." *Id.*, at 275. "[R]ather than wait for potential per diem penalties to accumulate, Benton County filed a declaratory action seeking a court determination of its obligations under the PRA." *Id.* The trial court granted summary judgment in favor of Benton County.

On appeal, Ms. Zink challenged Benton County's standing to invoke the UDJA. *Id.*, at 277-79. Conducting a *de novo* review, this Court held that "Benton County has a personal stake in the outcome and has suffered an injury for declaratory judgment purposes based on Ms. Zink's explicit threats to sue Benton County." *Zink*, 191 Wn. App. at 279. This Court also observed that allowing Benton County to seek declaratory judgment "spares the agency the uncertainty and cost of delay, including

the per diem penalties for wrongful withholding." *Id.*, at 280 (citing *Soter*, 162 Wn.2d at 751) (internal quotation marks omitted). The trial court's denial of Ms. Zink's argument that Benton County lacked standing under the UDJA was therefore affirmed. *Id.*, at 280.

The same result is appropriate here. Mr. Magee made an explicit threat to commence litigation against YSD in connection with its response to his public records request. CP 56. The dispute over the manner and extent to which YSD was obligated to produce pre-employment drug screening records was genuine. *See* CR 56, 67, 68, 89-97, 102, 104. The stakes for YSD were high. *See* RCW 42.56.550(4). In order to avoid the uncertainty and cost of delay, including potential per diem penalties, YSD sought a declaratory ruling under the UDJA. RCW 42.56.550(4). As a steward of public funds, YSD was entitled to a declaratory ruling on this issue.

D. Seeking declaratory relief under the UDJA was an appropriate method for YSD to resolve the dispute between it and Mr. Magee.

In his brief, Mr. Magee insinuates that he is the only party entitled to commence a legal action related to his public records request. Br. 26. He also contends that there was no basis in law for YSD to bring its declaratory action. Br. 5, 15, 17, 26. He is incorrect on both points.

Public agencies routinely invoke the UDJA in the context of PRA litigation. *See e.g., Zink*, 191 Wn. App. at 275 ("In late January 2014, rather than wait for potential per diem penalties to accumulate, Benton County filed a declaratory judgment action seeking a court determination of its obligations under the PRA."); *City of Fife v. Hicks*, 186 Wn. App. 122, 128 (2015) (city filed declaratory judgment action against requestor alleging that certain records sought by requestor were not public records or, in the alternative, were exempt from disclosure under the PRA); *City of Seattle v. Egan*, 179 Wn. App. 333, 335-36 (2014) (city filed declaratory judgment action against requestor in order to "resolve any uncertainty and to avoid the accumulation of potential penalties should [the requestor] delay suing."); *City of Lakewood v. Koenig*, 176 Wn. App. 397, 400 (2013), *aff'd*, 182 Wn.2d 87 (2014) (city filed a declaratory judgment action against requestor seeking "an order declaring that it had fully complied with [the requestor's] public records request."); *Yakima v. Yakima Herald Republic*, 170 Wn.2d 775, 788 (2011) (county filed "a motion for relief pursuant to RCW 42.56.540 to enjoin the Herald-Republic from gaining access to sealed court records because the PRA did not apply or, alternatively, pursuant to Ch. 7.24 RCW, to have the county's responsibilities with respect to the paper's records request declared and delineated.").

The Attorney General's Public Records Act - Model Rules also note that agencies may file actions under the UDJA in order to resolve uncertainty about the manner in which the PRA applies to records. WAC 44-14-04003 n. 14.

Further, Washington courts have applied the UDJA to public records requests and to school districts under RCW 42.56.540. *See, e.g., Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 907 (2006) *affirmed*, 162 Wn.2d 716 (2007). Thus, YSD qualified as a “person” under the UDJA. RCW 7.24.020.

As the foregoing authority demonstrates, Mr. Magee's argument that YSD lacked standing/had no legal basis to request a declaratory ruling about the application of the PRA to the pre-employment drug screening records at issue is contrary to Washington law.

E. YSD did not waive its right to claim that the documents sought by Mr. Magee were exempt from disclosure under the PRA.

“A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.” *Bowman v. Webster*, 44 Wn.2d 667, 669 (1954). It may result from an express agreement or be inferred from circumstances indicating an intent to waive. *Id.*

Mr. Magee contends that YSD waived its right to claim the documents responsive to his public records request were exempt from production under RCW 42.56.258(2). Br. 29-33. His waiver argument is based on the fact that YSD allowed him to inspect 3 installments of responsive records, and make copies of some of those records, prior to the commencement of its declaratory action. Br. 30, 32. According to Mr. Magee, at the time of these inspections YSD knew it could have claimed an exemption relating to the records he was requesting but failed to do so. Br. 32. As such, he claims YSD waived its right to claim the requested documents are exempt from disclosure under RCW 42.56.250(2). This argument is legally and factually incorrect.

YSD's initial response to Mr. Magee's public records request indicated that the requested records may be exempt. Br. 31; CP 54. Beginning on April 11, 2019, YSD consistently asserted its position that the records being requested by Mr. Magee were exempt from production under RCW 42.56.250(2). CP 89, 90, 102, 104. In between these two dates, Mr. Magee was able to inspect the first of a projected 33 installments of responsive records. CP 33, 70, 72. Mr. Magee has cited no legal authority supporting the conclusion that this isolated incident was sufficient to establish that YSD intended to relinquish its right that the documents requested by him were exempt from production, and that

YSD's actions in allowing the inspection were inconsistent with any other intention. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-10 (2011) (citing *Bowman*, 44 Wn.2d at 669).

To the contrary, the record on appeal demonstrates that given Mr. Magee's explicit threat of litigation, YSD decided that it would produce pre-employment drug screening records until it could *either* (1) secure Mr. Magee's agreement that the records could be withheld in their entirety pursuant to RCW 42.56.250(2); *or* (2) obtain a judicial determination that the records could be withheld in their entirety pursuant to RCW 42.56.250(2). CP 89, 90, 102, 104. This course of conduct by YSD is inconsistent with waiver. Rather, it reflects a deliberate and ongoing effort by YSD to protect its statutory right to withhold these records.

F. *Bainbridge Island* does not provide support for Mr. Magee's claim of waiver.

In support of his waiver argument Mr. Magee relies on the statement in *Bainbridge Island*, 172 Wn.2d at 410, that "[T]he failure to object to a single public records request is only a relinquishment of the right to prevent that specific production." Br. 31. Mr. Magee misunderstands or mischaracterizes the import of this statement by the Supreme Court.

In *Bainbridge Island* two members of the news media submitted requests under the PRA for copies of a criminal investigative report and an internal investigative report pertaining to a police officer's alleged misconduct. 172 Wn.2d at 404-05. Those requests were submitted to the agency that employed the officer in question, as well as an outside agency that conducted the criminal investigation into the complaint (i.e., the City of Puyallup). *Id.* The officer and his union commenced a legal action to enjoin his employer from producing the requested documents. *Id.* at 405. The agencies that generated the requested reports were not joined as parties to that case. *Id.* The trial court granted the requested injunction, but it did not apply to the request submitted to Puyallup. Puyallup produced the documents to the requestors who in turn wrote a news article based in part on information contained in the reports. *Id.*

Subsequently, two individuals submitted requests to Puyallup for a copy of report related to the criminal investigation. *Id.* at 406. The officer and his union again filed suit attempting to block the disclosure of the report. *Id.* The trial court ultimately ruled that the report was exempt from disclosure in its entirety. *Id.* The requestors appealed. *Id.*

One of the arguments raised on appeal was that the officer had waived his right to claim the report was exempt because he failed to join Puyallup in the prior lawsuit. *Id.* at 409. The Supreme Court rejected this

argument. *Id.* at 410-11. It noted that there was no statutory basis for the appellants' waiver claim. *Id.* at 409. It also concluded that while the officer's prior attempt to block production of the reports to members of the media, it nonetheless reflected his intent to protect his right to privacy, "not forever waive it." *Id.* at 410.

This was the context in which the Supreme Court noted that "the failure to object to a single public records request is only a relinquishment of the right to prevent that specific production." *Id.* The case does not support the proposition that the disclosure of a small portion of records responsive to a public records request somehow constitutes a waiver of the agency's ability to claim that the balance of the undisclosed documents are exempt from disclosure under the PRA. Nor does *Bainbridge Island* address how that question should be analyzed in situations where, as here, the agency's initial response letter informs the requestor that the requested documents may be exempt from disclosure.

As outlined above, the facts in this case demonstrate that YSD did not waive its right to claim that the records requested by Mr. Magee were exempt from disclosure.

G. Mr. Magee's counter-motion for summary judgment was not properly noted for hearing.

Mr. Magee claims that the trial court erred by "Denying/not considering" his counter-motion for summary judgment. Br. 14. However, the appellate record demonstrates that Mr. Magee did not properly note that motion for hearing and/or provide YSD with the necessary notice thereof. CR 56; LCR 56(e)(1); CP 178. As such, Mr. Magee was not entitled to have his motion heard.

H. The issues raised by Mr. Magee's counter-motion for summary judgment were rendered moot by the trial court's order granting summary judgment to YSD.

Mr. Magee's counter-motion for summary judgment argued: 1) that YSD had no standing to bring its declaratory judgment action against him, and "therefore this matter is frivolous and without a basis in law and fact;" 2) that YSD had waived its right to claim the requested records were exempt from disclosure under the PRA; 3) that by disclosing some of the requested records to him, YSD had violated the rights of the individuals to whom those records pertained. CP 141, 142. Mr. Magee alleged each of these grounds as basis for which the trial court should deny YSD's motion for summary judgment. CP 128-140. His counter-motion did nothing more than rehash his arguments in opposition to YSD's motion.

As YSD pointed out in its reply memorandum, the third basis for Mr. Magee's counter-motion for summary judgment is irrelevant to any issue presented by YSD's declaratory action. CP 177, 178. As such, the Court was correct to refuse to consider it and/or rely upon it as a reason to deny YSD's motion for summary judgment

With respect to the identical standing and waiver arguments Mr. Magee raised in opposition to YSD's motion for summary judgment and in support of his own counter-motion, the trial court considered and rejected each of those arguments on their merits in granting summary judgment in favor of YSD. CP 197-199, 208, 209. An issue is moot if, among other things, "a court can no longer provide effective relief." *State v. Burdette*, 178 Wn. App. 183, 203 (2013). The trial court could not grant both YSD's and Mr. Magee's motion for summary judgment. The necessary result of granting YSD's motion for summary judgment was that the trial court could "no longer provide effective relief" in favor of Mr. Magee on the issues raised by his counter-motion. *Id.* Accordingly, the issues raised by his counter-motion were rendered moot, and the trial court was correct not to give them consideration.

V. CONCLUSION

For the forgoing reasons, the trial court's granting of YSD's motion for summary judgment should be affirmed.

RESPECTFULLY SUBMITTED THIS 22nd day of July, 2020.

MENKE JACKSON BEYER, LLP

/s/ Quinn N. Plant

Quinn N. Plant, WSBA #31339

807 N. 39th Avenue

Yakima, WA 98902

(509) 575-0313

qplant@mjbe.com

Attorneys for Respondent Yakima School

District No. 7

MENKE JACKSON BEYER, LLP

/s/ Seann M. Mumford

Seann M. Mumford, WSBA #43853

807 N. 39th Avenue

Yakima, WA 98902

(509) 575-0313

smumford@mjbe.com

Attorneys for Respondent Yakima School

District No. 7

DECLARATION OF SERVICE

On the day set forth below, I emailed and deposited in the U.S. Mail a true and accurate copy of: Brief of Respondent Yakima School District No. 7 in Court of Appeals, Division III, Cause No. 3706 to the following parties:

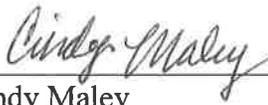
Mr. Andrew L. Magee
Attorney at Law
Andrew L. Magee LLC
44th Floor
1001 Fourth Ave. Plaza
Seattle, WA 98154
amagee@mageelegal.com

Electronic filing by JIS Portal to:

Clerk of the Court
Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington and of the United States that the foregoing is true and correct.

DATED THIS 22nd day of July, 2020, at Yakima, Washington.



Cindy Maley

MENKE JACKSON BEYER, LLP

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