No. 92161-0

No. 45756-3-II

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

MIKE BELENSKI,

Appellant

v.

JEFFERSON COUNTY,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The brief submitted by Respondent Jefferson County (hereinafter the "County") attempts to deflect the Court's focus from the deficiencies of the County's position and offers no legally tenable argument or factual basis as to why the decisions of the trial court should be affirmed. The County's brief ignores the plain, unambiguous statutory language found in the Public Records Act, RCW 42.56 (hereinafter the "Act"), as well as the case law construing it. Review of the record and the applicable legal authority clearly demonstrate that the County repeatedly violated the Act. The County does not contest or attempt to refute Mr. Belenski's evidence and legal authority that the County silently withheld records; it simply ignores it.

The County lied to Mr. Belenski when it advised him that it had "no responsive records" (CP 214) to his September 27, 2010 public records request (CP 211) for Internet Access Logs (hereinafter "IAL"). The County admits it has about 304 million IAL records.

II. ARGUMENT IN REPLY

Contrary to the County's claims, the existence of a "nexus" is not required for a record to be considered a "Public Record". A plain reading of the definition of "Public Record" (RCW 42.56.010(3)), only requires that the record contain information relating to the conduct of government

or the performance of any governmental function. The IAL that Mr. Belenski requested contain information about how County employees use County computers, what they view or research on the Internet, how much time they spend using County computers, etc., all of which is clearly information relating to the conduct of government. Mr. Belenski did not demand that the County provide access to the data in any specific format. Additionally, contrary to the its claims, the County could have produced the IAL based on the technology it held. As Mr. Thiersch explained in his Declaration (CP 91, ¶9), the IAL were easily readable using non-proprietary, commercial software (e.g., Microsoft Excel). In fact, during the January 3, 2012 meeting, IAL records were inspected using Microsoft Windows Notepad and those same textual IAL records were imported into Microsoft Excel, allowing the individual records and fields to be examined in a more legible, tabular format. Only a small portion of the IAL records requested by Mr. Belenski were available during the meeting. The purpose of the January 3, 2012 meeting was to get the computer experts together to determine a method by which possibly exempt information might be redacted from the IAL.

The County failed to provide the "fullest assistance" to Mr. Belenski and the purchase of several thousand dollars of additional

software was unnecessary, not requested by Mr. Belenski and failed to provide the records requested by Mr. Belenski.

It is incorrect that Mr. Belenski was silent for ten months as claimed by the County. On March 12, 2012, Mr. Belenski attended a County Commissioners meeting, asked about his September 27, 2010 request for IAL, and was told that County Administrator Morley would "follow up" with Mr. Belenski regarding this request, but neither Mr. Morley nor anyone else ever followed up or contacted Mr. Belenski. Eventually, Mr. Belenski grew tired of waiting so he filed suit. (CP 124-125).

Each of the County's arguments is rebutted below:

A. The Nature of the County's Computer System and Electronic Records (Resp. Br. 3-9)

The Act makes no differentiation between records that are prepared, owned, used or retained either automatically, intentionally or unintentionally. Nor does the Act find any difference between records that are prepared, owned, used or retained by a computer program or manually.

It is irrelevant to Mr. Belenski's requests for IAL as to whether the computer user knows if his or her computer has contacted one website or several websites.

The County admits that all users' contacts with websites are recorded by a software program compatible with Sonicwall known as Viewpoint. Each record of these contacts is known as an "Internet Access Log" or "IAL". (Resp. Br. 4). The County admits to have 304 million of these "contacts" or IAL's. (Resp. Br. 4).

The Sonicwall appliance creates "Syslog" records when internet contacts occur, and Viewpoint archives those Syslog records as IAL's by storing them in a series of compressed zip files that have a ".upd" suffix. This process is described by Mr. Shambley (CP 363 ¶31, and CP 364-365, ¶40-45) and Mr. Thiersch (CP 91, ¶8).

IAL records are useful for monitoring and reporting because they store detailed information including internet host names, users' identities, internet addresses (URLs) of specific web pages accessed, dates/times of such accesses, etc., and in the case of the County's SonicWall/Viewpoint environment, IAL records are stored in compressed .upd files. (CP 92, ¶10). Regardless of whether the IAL records sought by Mr. Belenski were in their native or raw format in a Syslog or were archived by Viewpoint as a .upd file, both would contain information responsive to Mr. Belenski's request for IAL.

Since each original Syslog is archived by Viewpoint before it is deleted, the default retention setting of 15 days for Syslog data is

irrelevant to Mr. Belenski's requests for IAL because the Syslogs are archived by Viewpoint as .upd files.

The County claims that 15 seconds of Syslogs consumes 17 single spaced pages, and one day's Syslogs would consume 1,600 letter-sized pages. Mr. Belenski did not ask for Syslogs, nor did he ask for the IAL in paper form; in fact, he offered to provide a flash drive to the County to copy the IAL onto. It is irrelevant how many paper pages the Syslogs or IAL would consume because IAL can be inspected or copied electronically.

The County has used the terms Internet Access Logs and Internet Access Audit Logs, synonymously in the past and now it is trying to state that Mr. Belenski incorrectly treats the terms as synonymous. Mr. Belenski's requests were for Internet Access Logs. Mr. Belenski has requested and received Internet Access Logs on at least two occasions in the past (CP 305, ¶15); those IAL contained the username, website accessed, date and time, etc. The same information is available in the 304 million IAL records reportedly retained by the County. These are the records sought by Mr. Belenski. Rather than disclosing the existence of these IAL records to Mr. Belenski, the County chose to advise Mr. Belenski that it had "no responsive records" (CP 214).

Discussions at the January 3, 2012 meeting did not involve the infeasibility of backing up every record or Syslogs. The discussions involved IAL's. Mr. Shambley, Mr. Winegar and Mr. Thiersch discussed technical issues including how to redact the information from the IAL that were exempt under the Act. Mr. Belenski did not object to anything the County wanted to do involving the redaction of the IAL. Mr. Thiersch explained and illustrated on a white board how the exempt information could be redacted/deleted from a copy of the original IAL. Mr. Shambley took notes and said he would follow up with a status report (CP 122, ¶11). Without consulting Mr. Belenski, the County decided to purchase and use a software program called Webspy to create an Internet activity summary report on a DVD, which the County provided to Mr. Belenski on January 19, 2012; that DVD did not contain the IAL requested. The County did not provide Mr. Belenski with an exemption log (CP 124, ¶19). The Webspy software used the IAL to create a summary report, which was not what Mr. Belenski requested.

Difficulties involving redactions are not a reason or exemption under the Act to deny access to public records. At the January 3, 2012 meeting, Mr. Shambley stated that "Chris Grant [another County Information Services employee] decided that you didn't have the software

to look at them.", with "you" being Mr. Belenski. (CP 195, ¶18; CP 124, ¶20)

In Fisher Broadcasting v. City of Seattle, No. 87271-6, June 12, 2014, the Washington Supreme Court ruled that a "public record" is broadly defined in the Act and includes "existing data compilations from which information may be obtained" "regardless of physical form or characteristics." RCW 42.56.010(4), (3). This broad definition includes electronic information in a database. Id.; see also WAC 44-14-04001. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Fisher Broadcasting v. City of Seattle at 9.

Therefore, regardless of what database(s) contain IAL and regardless of the physical form or characteristics of the IAL, the IAL are not exempt from disclosure.

With regard to the County's claim of security concerns (Resp. Br. 8), if there was information that was exempt from disclosure, the County should have redacted it from the IAL's and provided Mr. Belenski with redacted IAL's with citation(s) to the applicable exemption(s).

B. **Belenski requests information concerning internet usage and the County makes efforts to respond. (Resp. Br. 9-14).**

As the County points out, "Good solid data for the IAL is only available from November 10, 2011 forward, and data from other sporadic dates can and will be provided.". (Resp. Br. 11, bottom). Some of the sporadic data can be found on random pages from the Webspy report. (CP 65-67). These pages document several hits prior to Mr. Belenski's September 27, 2010 request for IAL, such as September 7, 2010, September 14, 2010 and September 20, 2010. The Webspy report was generated with the data found in the IAL's. The Webspy Vantage Ultimate software cannot generate internet activity reports without IAL records (CP 92, ¶10). This documents that rather than "no responsive records" as the County has claimed, that there were IAL records responsive to Mr. Belenski September 27, 2010 request.

Contrary to the County's allegation (Resp. Br. 12), Mr. Belenski did inspect a few of the IAL's during the meeting on January 3, 2012. The Act allows both inspection and copying (RCW 42.56.080) and Mr. Belenski felt that a copy of the IAL's was better than inspection because it would save numerous trips to the Courthouse and the hassle of trying to view records at the Courthouse (CP 122, ¶9).

Lastly, if the County was sincere about trying to provide Mr. Belenski with IAL, the County could have printed out some IAL on sheets of paper and redacted the exempt information and then allowed him to inspect them.

C. **Procedural History (Resp. Br. 14-16)**

With regard to Mr. Belenski's December 2, 2013 motion for reconsideration (Resp. Br. 16), the content of this Motion (CP 442 to 455) and Supporting Declaration (CP 414 to 441) are further documentation of the County silently withholding records. It is interesting to note that Mr. Belenski's request was only sent to County Departments and Offices that did not have records responsive to his request. Given the County's conduct towards Mr. Belenski this is not surprising. It should also be noted that Mr. Belenski is not required to double check the accuracy of the County's response to his requests. The County should not benefit from the silent withholding of records.

D. **Automatically Generated Computer Logs routinely Discarded by Firewall Software That does not relate to any Conduct or Government Decision-Making is Not a "Public Record" as defined by RCW 42.56.010(3). (Resp. Br. 16 – 29)**

The inquiry regarding the IAL as to whether the second element ("second prong") of the definition of "Public Record" is met, is whether the IAL contain information relating to the conduct of government or the

performance of any governmental or proprietary function. Mr. Belenski has previously briefed this at CP 15-18.

The definition of "Public Record" does not require that there must be a nexus between the record in question and some governmental decisional process or conduct for that record to be a "Public Record" as claimed by the County.

Concerned Ratepayers Ass'n v. PUD #1 of Clark County WA, 138 Wn.2d 950 (1999) is easily distinguished from the instant case. The record in question in Concerned Ratepayers was held by a private entity and the Supreme Court's ruling expanded or augmented the definition of "Public Record" by concluding that reviewing, evaluating or referencing records held by private entities constituted "use" of the record if there is a "nexus" between the information at issue and the agency's decision making process and action. (CP 19-21)

In Dragonslayer v. Washington State Gambling Com'n, 139 Wn. App. 433 (2007) is also easily distinguishable from the instant case. The records at issue in this case were financial statements of two card rooms that were required to submit the statements to the Washington State Gambling Commission. The case was remanded to the trial Court because the Court of Appeals could not determine if the financial statements contain "information related to the conduct of government or

the performance of any governmental proprietary function." We broadly interpret the second element of the public record test to allow disclosure. Id at 444. The Court made no ruling that a "nexus" was required, only that a determination was needed as to whether the financial statements were related to the conduct of government. (CP 21-23).

The County is not a private entity like a general contractor or a card room, it is a public agency subject to the mandates of the Act. The ruling by the trial Court in Mr. Belenski's case would limit the public's access to only those records for which he or any other requester can establish a "nexus" between the information in the requested record and the County's decision making process or governmental function. This is a narrow and exceptionally restrictive, rather than broad, definition of "public record" and is in conflict with established statutory construction and interpretation of the Act. (CP 23).

When applying the plain language of the definition of "Public Record" and liberally construing the Act as required by RCW 42.56.030, the IAL satisfy the second prong of the definition of "Public Record" because the IAL contain information relating to the conduct of government as to how County computers are being utilized, what websites are being accessed, what job tasks are being facilitated, how work hours are being spent, etc. The purpose for providing internet access to County

employees is to give them "tools to perform their job functions" and "Network and Internet access is provided to county employees as a research and communication tool to assist in conducting county business (CP 9, CP 28,¶3, CP 30).

Mr. Belenski's interpretation of RCW 42.56.010(3) is far from strained (Resp. Br. 21); his is a plain reading of the statute. What the information contained in the IAL will reveal to Mr. Belenski is of no concern to the County. The County does not have the authority to withhold the information contained in the IAL merely because the County has concluded the IAL reveals or fails to reveal particular records or nonexempt information.

Any person reading the Lake v. City of Phoenix, 222 Ariz. 547, 218 P.3d 1004 (2009) case would immediately note that the opinion specifically states that the Arizona statutes do not define the term "public record". Id at 1008, ¶9. This leaves the Arizona courts to interpret what is a "Public Record" and whether a "nexus" needed to be present for a particular record, in a particular situation, to be a "Public Record". Also of note is that O'Neill v. City of Shoreline, 170 Wn.2d 138, (2010) makes no reference to any requirement that a "nexus" needs to be established in order for a record to be considered a "Public Record".

The County repeatedly cites to cases that are easily distinguishable from Mr. Belenski's case or are clearly not on point. Pulaski Cty v. Arkansas Democrat-Gazette Inc., 260 S.W.3d 718 (2007); Denver Publishing Co. v. Board of County Commissioners of County of Arapahoe, 121 P.3d 190 (Colo 2005); State v. City of Clearwater, 863 So.2d 149 (Fla. 2003) and Schill v. Wisconsin Rapids Sch. Dist., 786 N.W.2d 177 (Wis 2010), involve private or personal emails created on government computers and whether the emails are "Public Records". (Resp. Br. 26-27). Mr. Belenski did not make a request for personal or private emails.

As for Brennan v. Giles County Board of Education, 2005 WL 1996625 (Tennessee COA, August 18, 2005), the definition of "Public Record" in Tennessee is basically any writing "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.". RCW 42.56.010(3) has a much broader definition and is not limited to the records found in the Tennessee definition of "Public Record".

It should also be noted that the second to last paragraph in this decision, specifically states that Mr. Brennan did not question the ruling of the trial court concerning whether the particular documents are within the definition of public records. Further, Washington State unpublished

opinions are not to be cited, and the County provides no authority that would allow the County to cite to an unpublished opinion from another state, so Mr. Belenski would argue it has no authoritative value.

As for whether the Internet Access Logs satisfy Prong #3 (Resp. Br. 29, bottom), Mr. Belenski has addressed this issue (CP 172-175). West v. Thurston County, 168 Wn. App. 162 (2012) is another case that can be easily distinguished from Mr. Belenski's. Mr. Belenski did not request billing invoices from outside attorney's defending the County, he asked for IAL. Cowles Pub. Co. v. Murphy, 96 Wn.2d 584 (1981) is not on point when used to analyze whether the IAL are "Public Records".

The County continually claims that the Syslogs (also known as IAL) are not Public Records, but the evidence in the record documents that they are. (CP 71-77)

The IAL were prepared by software purchased by the County.

The IAL were owned by the County because they were prepared on a County owned computer, with County owned software. If the County does not own the IAL, who does?

The IAL were used by the County during the January 3, 2012 meeting and to create the Webspy report given to Mr. Belenski on January 19, 2012.

The IAL were retained by the County and the County currently has about 304 million records in their possession.

E. Belenski must demonstrate the requested records are "Public Records" under the Act. (Resp. Br. 35-36)

The County incorrectly interpreted the ruling in Dragonslayer in trying to shift the burden of proof as to whether the IAL are "Public Records" to Mr. Belenski. The citation the County used from Dragonslayer clearly states that the proceeding is brought under RCW 42.56.540, which is titled Court Protection of Public Records. The Court in Dragonslayer called this an injunction statute. Mr. Belenski did not seek an injunction involving the IAL.

Pursuant to RCW 42.56.550(1), the burden of proof is on the County to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

Further, the Washington State Supreme Court ruled in Fisher Broadcasting v. City of Seattle, No. 87271-6, June 12, 2014, that "The agency refusing to release records bears the burden of showing the secrecy is lawful" Fisher Broadcasting v. City of Seattle at 6.

F. In any event, the County fulfilled Belenski's Request for Syslog Data. (Resp. Br. 36-38)

Contrary to the County's claims, Mr. Belenski did take the County up on its offer of access to all the Syslogs (also known as IAL), but in reality the County provided access to only a few. This occurred during the meeting on January 3, 2012, between Mr. Shambley, Mr. Winegar, Mr. Thiersch and Mr. Belenski. The Act provides for both inspection and copying (RCW 42.56.080), not just inspection.

Mr. Belenski was advised on December 8, 2011, that the County needed additional time to redact various information found in the IAL. (CP 235). Note that the Syslogs referred to by Mr. Shambley are IAL that are contained in an .upd file. The County has never provided Mr. Belenski with redacted IAL.

Additionally, the County is incorrect in that it informed Mr. Belenski that it had obtained upgraded Webspy software and that it was discussed in December 2011 and on January 3, 2012. (Resp. Br. 37, bottom). It was not discussed with Mr. Belenski prior to January 19, 2012. The first Mr. Belenski heard that he would be getting a Webspy report was on January 19, 2012 (CP 129). Mr. Belenski did not request a Webspy report, he requested IAL.

Further, Mr. Belenski was not asked by the County, nor did he ever agree to accept a Webspy summary report as a substitute for the actual IAL themselves, or as full satisfaction of his requests for IAL. (CP 126, ¶26). In addition, the County has yet to provide Mr. Belenski for an exemption log for the data contained in the IAL themselves, but not contained in the Webspy summary report (CP 126, ¶26). It should be clear that the County has failed to fulfill Mr. Belenski's request for IAL.

G. Request #4 does not seek identifiable public records. (Resp. Br. 38-42)

Mr. Belenski has previously addressed the issue of whether Request #4 was a request for identifiable public records (Opening Brief 25-30). As the Washington Supreme Court ruled in Fisher Broadcasting v. City of Seattle, No. 87271-6, June 12, 2014, "Agencies must make a sincere and adequate search for records. RCW 42.56.100; Neighborhood Alliance of Spokane v. Spokane County, 172 Wn.2d 702, 720, 723, 261 P.3d 119 (2011)." Fisher Broadcasting v. City of Seattle at 7.

The County made no attempt to search for the records requested by Mr. Belenski. Records requesters are not required to use the exact name of the record, but requests must be for identifiable records or class of records.

Mr. Belenski did not ask for information about public records, he requested copies of every electronic record for which Jefferson County Information Services does not generate a backup and offered to provide the media on to which the records could be copied. This request for records was made pursuant to RCW 42.56. (CP 240).

Public records are repeatedly lost by the County. The most recent Mr. Belenski is aware of are the hard drive failure resulting in lost IAL (CP 233, top of box) and further lost IAL in 2012 (CP 95, ¶16). The County is required by the Act to protect public records from damage and disorganization (RCW 42.56.100), yet continually fails to take action to protect records.

The County was not required to be a mind reader in order to process Mr. Belenski's request. The County was provided enough information that any County employee could locate at least some of the public records Mr. Belenski requested. The County failed to provide an exemption log for the records they withheld involving this request, which violated the Act.

H. The Court properly upheld the County's Application of Exemptions Applicable to Employee Records for Chris Grant. (Resp. Br. 42-46)

Prior arguments regarding Mr. Belenski's request for contact information involving Chris Grant can be found at CP 705-709 and

Opening Brief 30-35.

Contrary to what the County is trying to portray to this Court, the Court ruled in Seattle Firefighters Union Local No. 27 v. Hollister 48 Wn. App. 129, 134 (1987) that "The public employee's records exemption is narrowly drawn, however, to include only those disclosures that would violate the right to privacy. Therefore, even though the requested records are subject to the public employee exemption, we must determine if release of the records would violate the personal privacy of respondents."

The Court approved the release of records that contained information about numerous retired firefighters that had various problems like back injury, asthma, emphysema, ulcersis, etc. The public employee exemption of RCW 42.17.310(1)(b) (Recodified RCW 42.56.230) only applied to the extent that the release of the records would violate the right of privacy. Id at 136. There has been no showing by the County that the release of the redacted information involving Chris Grant would violate his right to privacy. Information such as his name is not exempt from production. Tacoma Public Library v. Woessner, 90 Wn. App. 205, 224 (1998).

I. Belenski's Claims for the First and Second Requests were untimely under the PRA's Statute of Limitations. (Resp. Br. 46-49).

Mr. Belenski has previously addressed the issue of whether any of his public records requests were untimely (CP 170-172). The County should not benefit from their deception regarding the existence of the IAL requested on September 27, 2010. RCW 42.56.550(6) states that "Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.". The County has never claimed any exemption (nor did it provide an exemption log) for the IAL that Mr. Belenski requested on September 27, 2010, nor did the County provide any IAL at all. The County's response was "no responsive records". (CP 214). It is plain from the content of the case cited by the County, Bartz v. State Department of Corrections Public Disclosure Unit, 173 Wn. App. 522 (2013), that it is not on point. Mr. Bartz was provided one installment of records, triggering the "last production of a record on a partial or installment basis" provision found in RCW 42.56.550(6). Mr. Belenski was not provided any records at all and records were silently withheld from him. Thus, neither provision of RCW 42.56.550(6) has been triggered.

Further, accepting the argument of the County that Mr. Belenski's Request #1 and #2 are time barred would lead to an absurd result in that an

agency can silently withhold records from a requester and evade the mandates of the Act, if the existence of records responsive to the request, can be hidden from the requester for 1 year. Absurd statutory interpretation is to be avoided. Cannon v. Dep't of Licensing, 147 Wn. 2d 41, 57 (2002) ("This court will avoid a literal reading of a provision if it would result in unlikely, absurd, or strained consequences.").

The Internet Access Logs requested by Mr. Belenski clearly fit the definition of "public record" as defined by the PRA and Mr. Belenski respectively asserts that his filings were timely and that the County silently withheld records from him.

III. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Mr. Belenski respectively asks this Court to find (1) that the IAL are public records, (2) that his request for electronic records that are not backed up was a request for identifiable public records, (3) that the sealed records contain non-exempt information involving Chris Grant, (4) that the County failed to prove a brief explanation of how the exemptions applied to the records withheld involving Chris Grant, and (5) that the County silently withheld records from Mr. Belenski, and to remand this litigation to the trial court for a ruling consistent with this court's ruling.

Respectfully submitted this 20th day of June, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 2

MIKE BELENSKI, Appellant, -vs- JEFFERSON COUNTY, a Washington State political subdivision, Respondent.	NO. 45756-3-II PROOF OF SERVICE

TO: Clerk of the Court of Appeals, Division 2

AND: Mr. David Alvarez, Chief Civil Deputy Prosecuting Attorney
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AND: Mr. Jeffrey Myers, Associated Counsel
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I, Mike Belenski, on the 20th of June, 2014, put in the US Mail to DPA David Alvarez one (1) copy of the following:

1. Reply Brief of Appellant

Additionally, I, Mike Belenski, on the 20th day of June, 2014, served DPA

David Alvarez (1) copy of each of the above listed pleadings, via the email address dalvarez@co.jefferson.wa.us and on the 20th day of June, 2014, served associate counsel Jeff Myers with (1) copy of each of the above listed pleadings, via the email address jmyers@lldkb.com.

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

Signed and dated this 25th, day of June, 2014, at Mats Mats, Washington.

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