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SUPREME COURT  
STATE OF WASHINGTON  
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REPLACES APPELLANTS BRIEF  
FILED 1/22/2019

**NO. 959374**

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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EDWARD KILDUFF,

Appellant

v.

SAN JUAN COUNTY, a political subdivision of the State of Washington,  
and JAMIE STEPHENS, in his capacity as San Juan County Council  
Member and Public Records Officer,

Respondents

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**BRIEF OF APPELLANT**  
*(Amended)*

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## I. INTRODUCTION

This appeal presents the question of whether an agency may compel a requester of public records who has been denied records to exhaust the agency's own appeals process prior to bringing an action for judicial review. It is a question of first impression and fundamental importance. Because such an internal review process conflicts with the plain language, case law and public policy behind Washington's Public Record Act, RCW 42.56 *et. seq.*, Appellant urges this Court to reject that an agency can require such exhaustion prior to judicial review and remand this case for further proceedings on the merits.

Appellant further prays that the Court reverse the \$10,000 in sanctions assessed Plaintiff and his attorneys under CR 11 and RCW 4.84.185 with respect to Plaintiff's ouster claim as neither the suit, as a whole, nor the ouster claim by itself were frivolous. Rather such a claim was supported by law—or at the very minimum sought a good-faith extension of the sparse case-law applicable to the unusual factual circumstances of this case, and was in no way interposed for an improper purpose.

## II. STATEMENT OF THE CASE

Appellant Edward Kilduff ("Mr. Kilduff") sued San Juan County ("County") and Mr. Jamie Stephens ("Mr. Stephens") in both his official capacities as an elected council member of San Juan County Council and as the County's appointed Public Records Officer. CP 1-15. Mr. Kilduff

made two claims. *Id.* Mr. Kilduff first alleged a violation of the Public Records Act, RCW 42.56 (“PRA”), because the County had withheld non-exempt records for political reasons—records that he had requested and was entitled to review. *Id.* Mr. Kilduff’s second claim sought the ouster of Mr. Stephens as Mr. Stephens was simultaneously occupying two incompatible offices: the office of public records officer and the office of a County Councilmember. *Id.*

Mr. Stephens was represented by the San Juan County Prosecuting Attorney’s office. Mr. Stephens promptly moved to be dismissed from the lawsuit and for sanctions arguing that standing to bring an ouster action was limited to (a) persons who have a claim of interest in the illegally occupied office or (b) the prosecuting attorney pursuant to the *quo warranto* statute RCW 7.56.020. CP 337-339. After a single round of briefing and the initial hour-and-a-quarter long hearing on the matter, the trial court granted Mr. Stephens’ motion to dismiss on September 15, 2016 but reserved making a determination on the sanctions. *Id.*; RP 9/15/16<sup>1</sup> at 3, 19, 55. Nineteen months later, on May 8, 2018, the trial court awarded Mr. Stephens sanctions in the amount of \$10,000 (assessed jointly and severally against Mr. Kilduff and his attorneys) finding that the ouster claim was frivolous and that San Juan County Deputy Prosecutor Jon Cain had spent 40 hours at a rate of \$250 per hour to obtain the dismissal of Mr. Stephens. CP 363, 364-374.

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<sup>1</sup> Report of Proceedings are identified by hearing date to specify volume.

In the interim, the PRA claim was litigated and, a show cause hearing with live testimony took place over three days during a nine month period.<sup>2</sup> After hearing the three days of testimony, the trial court dismissed the PRA claim on the sole grounds that Mr. Kilduff did not seek internal review of the denial of his request pursuant to San Juan County Code (“SJCC”) 2.108.130. CP 363, 364-374. The trial court concluded that the County’s denial to Mr. Kilduff’s request to review records was not “final” for the purpose of judicial review and dismissed the case with prejudice. *Id.*

While the parties still dispute facts relevant to the underlying claim, this Court is presented with an entirely procedural question with respect to the ripeness of Mr. Kilduff’s PRA claim. Nevertheless an understanding of the factual background is necessary, however, to both provide context to Mr. Kilduff’s claim with respect to the PRA and to illustrate the good-faith basis for Mr. Kilduff’s ouster claim and how seeking the assistance of the trial court was reasonable under the unique factual circumstances of this case.

Mr. Kilduff is a Washington licensed geologist, hydro-geologist, and engineering geologist with a specialty in groundwater. RP 11/1/17 82-84. In addition, Mr. Kilduff owned and operated a local news website, The Trojan Heron, (located at [www. trojanheron.blogspot.com](http://www.trojanheron.blogspot.com)). RP

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<sup>2</sup> A hearing on the motion to dismiss Defendant Stephens took place on 9/15/16 and subsequent show-cause hearings took place on February 17, 2017, November 1, 2017 and November 8, 2017.

11/1/17 at 84. The Trojan Heron provided its readership extensive in-depth coverage of local news. *Id.*

Mr. Kilduff made his records request because he wanted to report to his readership on the subterfuge surrounding the de-classification of a local wetland by county officials. RP 11/1/17 at 85. Mr. Kilduff learned from the County Code Enforcement Officer Chris Laws that Officer Laws was concerned that a code enforcement file was in danger of being “expunged” as County officials were requesting that Officer Laws remove investigatory materials from an enforcement file that he had assembled. RP 11/1/17 at 85. Officer Laws’ assembled records pertaining to his investigation and report of Improper Governmental Activity (“IGA”) were contained in file code enforcement file # PCI-INQ-15-003 which is the subject of Mr. Kilduff’s PRA request. *Id. See also*, RP 2/17/17 at 64-68.

The enforcement file concerned the de-classification of a wetland on a property known as the Hughes Property. CP 81. The Hughes property was located adjacent to a property of Sheryl Albritton and one lot away from the residence of then San Juan County Council Member Bob Jarman. CP 165. Ms. Albritton had complained to Washington Department of Ecology because she saw that development was occurring on the Hughes parcel that she thought was prohibited because of the existence of a rated wetland on the parcel. CP 116.

The de-rating of the wetland came after San Juan County Manager Mike Thomas had been requested by Hughes’ neighbor/Council Member

Jarman to conduct an evaluation of the wetland and make a determination as to whether or not a wetland was present. CP 163-169.

Manager Thomas went to the parcel and declared—contrary to existing County records and a subsequent field survey conducted by the Department of Ecology—that there were “no signs of wetlands” on the Hughes parcel. CP 44-47, 168-169.

Manager Thomas was indisputably unqualified to make such an evaluation as the existence and categorization of wetlands was reserved for professionals with specific scientific training per San Juan County Code 18.20.170. CP 171-172. This determination by Manager Thomas allowed for more permissive development of the Hughes property and benefitted the Hughes by their not having to hire a “qualified wetland professional” to make such a determination. A written wetlands report, authored by a qualified wetland professional should have been provided to the County before the issuance of a building permit. CP 169. Indeed, Prosecutor Gaylord concluded that “[t]he instruction to issue the permit without a wetland reconnaissance report is contrary to county ordinance and policy.” CP 168.

On May 20, 2015, Mr. Kilduff made his two part written public records request to the County for a copy of “the contents of the San Juan County [Department of Community Development] code enforcement file # PCI-INQ-15-003” and “all documents, memos, statements, reports, correspondence and other records associated with the investigation of

improper governmental action, related to the above referenced code enforcement file (Hughes wetland issue, Mike Thomas investigation).” CP at 17.

On May 26, 2015, Public Records Clerk, Sally Rogers acknowledged Mr. Kilduff’s records request and indicated that a response to the request would be made “within the next 5-10 business days.” CP at 17.

On May 28, 2015, Prosecutor Gaylord called Mr. Kilduff and discussed his still-open PRA request. RP 11/1/17 at 87-89. According to phone records, the call lasted for less than four minutes. CP at 320. The parties dispute what was said during that short call, and the trial court made no findings as to the credibility of either participant’s version nor did the trial court make a finding as to what was said in the call. CP 363, 364-374.

Prosecutor Gaylord testified that during the call Mr. Kilduff agreed to limit his request (RP 2/17/17 at 58-59), however Mr. Kilduff testified that Prosecutor Gaylord only said that he was going to be provided with the most noteworthy of the responsive records next, the final IGA Report, but that the subject of his limiting the request did not come up. RP 1/1/17 at 102, 135-136. The trial court specifically recognized the divergence in testimony but, again, made no finding as to whose version—Prosecutor Gaylord’s or Mr. Kilduff’s—was more credible. CP 366-367. At no time was Mr. Gaylord’s understanding of the purported limitation allegedly

made by Mr. Kilduff in the telephone conversation communicated to Mr. Kilduff in a writing memorializing the call. RP 1/1/17 at 99.

In any event, six days later, On June 2, 2015, Clerk Rogers furnished a total of 45 pages of documents to Kilduff and informed him:

[i]n response to your public records request received on 5/20/15, attached [sic] copies of all documents, correspondence, memos, statements, reports, and other contents of the SJC DCD code enforcement file # PCI-INQ-15-003.

**Please expect the response to your request for copies of all documents, memos, statements, reports, correspondence and other records associated with the investigation of improper governmental action, related to the above referenced code enforcement file (Hughes wetland issue, Mike Thomas investigation) in another 2 weeks**, I will let you know if there will be any delays.

CP 19.

Then approximately two weeks later, on June 12, 2015, Clerk Rogers emailed Kilduff and wrote:

**In final response to your public records request** received on 5/20/15 for the remaining document, (“for copies of all documents, memos, statements, reports, correspondence and other records associated with the investigation of improper governmental action, related to the above referenced code enforcement file (Hughes wetland issue, Mike Thomas investigation)” per Randy Gaylord he spoke to you by phone it was agreed that the County would proceed with providing a copy of the final report redacted as done for the response to Ms. Albritton’s public records request.

Attached is a memorandum dated 3/11/15 from Randall K. Gaylord, RE: Report on IGA Report dated January 21, 2015. The attachment has the name redacted of the person making the report pursuant to RCW 42.41.030. The identity of a reporting person is to be kept confidential to the extent possible under law, unless the employee authorized the disclosure of his or her identity in writing. RCW 42.41.030(7).

**This email response and attachment fulfills your public records request.** If you have any questions related to this request or believe we should have provided additional documents, please let me know.

CP at 78. (Emphasis supplied).

A total of 7 additional pages were provided with this final email. CP 79-85. No exemption log was provided, and no additional records were identified as existing but withheld. The sole explanation as to what was not being disclosed was the redaction explained in Clerk Rogers' email of June 12. CP at 78.

It cannot be seriously disputed that there existed other responsive records to Mr. Kilduff's request that were in the County's possession but were not tendered. In fact, the County tendered additional documents to Mr. Kilduff on July 27, 2016 after the instant suit was initiated. CP 97. Mr. Kilduff further established he had **never** been provided certain responsive records that were responsive to his request and which indicated that Prosecutor Gaylord personally directed the sanitization of the Code Enforcement File and caused the removal of records that the Prosecutor did not want Mr. Kilduff to see. RP 2/17/17 at 74-76.

Perhaps the most troubling document which was denied Mr. Kilduff and which was **never** provided by the County was one which clearly demonstrated Prosecutor Gaylord's interest in both the withholding of responsive records and his interest in keeping Mr. Stephens on as the PRO (despite the incompatibility). This was a May 12, 2015 email by

County Planner Colin Maycock with the subject “Code Enforcement and IGA files”. CP 298-299.<sup>3</sup>

The May 12 Maycock email describes in specificity that Officer Laws had been ordered to segregate his files by his supervisor and by Prosecutor Gaylord and that there was concern amongst staff that this was contrary to the PRA as at that time (May 12) Ms. Albritton had a pending request for those files.<sup>4</sup> *Id.* Indeed, the email begins presciently, “I’m writing this because it bothers me that no one seems willing to put discussions into writing. If any of these actions result in litigation I would like to ensure we have some kind of record.” CP 298. Evidently troubled by what he was being asked to do, Officer Laws requested that he be ordered *in writing* to segregate the file and that he felt “bullied” by senior management to participate in the illegal act of segregating a file so that the records would be not part of the file that was subject to public inspection.

*Id.*

The Maycock email states that:

[Prosecutor Gaylord (“PA”)] stated that he thought [Code Enforcement Officer Chris Laws] was being insubordinate. [Officer Laws] again state that he had asked for directions in writing and none had been forthcoming from management. The PA stated that they didn’t need to put it in writing and that if Chris was worried then there were 4 witnesses to the directive to pull the IGA documents from one file.

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<sup>3</sup> This document was never provided to Mr. Kilduff by the County even subsequent to the initiation of the instant suit.

<sup>4</sup> Indeed, the Albritton request resulted in litigation with the County being found liable for PRA violations. See, *Albritton v. San Juan County* (Skagit No. 15-2-01429-6).

The PA then stated again he thought [Officer Laws] was being “difficult” and that file maintenance was part of his job and refusal to do so appeared to be insubordination.

The PA stated he had told Chris at the beginning to keep separate files, and repeated that all documents relating to the IGA were “personal”.

*Id.*

Despite this substantial showing, the trial court held that because Mr. Kilduff did not avail himself of the County’s *sui generis* administrative exhaustion ordinance embodied in SJCC 2.108.130 there had been no “denial” and Mr. Kilduff was barred from suing under the PRA since he had not exhausted the internal reconsideration procedures. CP 363, 364-374. It is this determination that is the source of the instant appeal with respect to the exhaustion issue.

These factual circumstances are also relevant to Mr. Kilduff’s second cause of action seeking the ouster of Mr. Stephens for his simultaneous occupation of two incompatible offices. In Mr. Kilduff’s second claim he alleged that since Mr. Stephens served both as an elected San Juan County Council Member and as the County’s appointed Public Records Officer, his simultaneous holding of the two offices were incompatible because one of his offices was subordinate to the other. CP 1-15.

San Juan County is a charter county with a three-member council. SJC Charter § 2.10. The County Council, as a corporate body, has a single employee, County Manager Mike Thomas (the same person who without

qualifications determined that the wetlands did not exist). See, San Juan County Code (“SJCC”) § 2.04.180. Manager Thomas, however, had in turn, selected Defendant Council Member Jamie Stephens to fill the position of Public Records Officer pursuant to SJCC § 2.108.070 which provides “[t]he public records officer for San Juan County is appointed by the County manager.” So Mr. Stephens, as Council Member, was Manager Thomas’s boss, but simultaneously Manager Thomas’s subordinate when Mr. Stephens was wearing his Public Records Officer hat.

Additionally, Mr. Kilduff also argued that Prosecutor Gaylord was personally conflicted and would not bring a *quo warranto* action to remove Mr. Stephens as public records officer or council member pursuant to RCW 7.56, since Prosecutor Gaylord had a demonstrable interest in suppressing the tender of the very same public documents that were germane to Kilduff’s public record request. As discussed above, Mr. Kilduff did this by providing evidence to the trial court that Prosecutor Gaylord had ordered the removal of the Code Enforcement Officer’s reports concerning the actions of Council Member Jarman and County Manager Thomas from that file prior to its production. See, CP 298-299, RP 2/1717 46-50, 64-73.

Despite this significant evidence evincing efforts by the Prosecuting Attorney *himself* to have the subject records sanitized so that they would not be subject to public scrutiny, and despite evidence which

showed that Mr. Stephens as Records Officer, and Mr. Stephens as Council Member, and Council Member Jarman and Prosecutor Gaylord all shared an interest in keeping these records secret, the trial court found that Mr. Kilduff's assertion that Mr. Stephens could not occupy both positions was not just legally defective but so meritless as to be *sanctionable* and awarded a sanction in the amount of \$10,000 to be jointly and severally assessed between Mr. Kilduff and his attorneys.

Throughout the proceedings below Mr. Kilduff had made clear that the unique circumstances of the Public Records Officer being simultaneously subordinate and dominate to the County Manager combined with the interest of Prosecutor Gaylord to sanitize the code enforcement file (which notably occurred on the "morning" of the day the County received Mr. Kilduff's request (RP 11/1/17 at 68-71)) was exactly the type of situation where the usual standing rules regarding *quo warranto* action should be relaxed. Simply, Mr. Kilduff argued in good faith that the circumstances warranted departure from the usual rule since Prosecutor Gaylord would not bring a removal action, and there was no other means for the public to seek removal other than asking the Court for assistance as Mr. Kilduff was doing, and thus Mr. Kilduff was clearly and justifiably seeking a clarification and, if necessary, a modification of existing law in connection with his ouster claim. See CP 279-287.

Indeed, Mr. Kilduff's counsel at the very first hearing in this matter introduced the situation as unusual and that Mr. Kilduff "was

presenting a good faith interpretation of the *quo warranto* statute that under the facts that we [] intend to prove in this case makes sense.” RP

9/15/16 at 9. Counsel for Mr. Kilduff explained:

[Council Member] Bob Jarman came, and he directed [Manager] Mike Thomas to go and evaluate a wetland, and that’s the file we’re talking about. We have one other person left on the council who could potentially discipline or talk to or somehow remediate the records officer.

And the problem with that is that Mr. Stephens and the remaining council member, Hughes, issued a memorandum eventually about the – the improprieties with the wetland designation, which exonerated Mr. Thomas – we think incorrectly – from any – any wrongdoing.

So the entire echelon of the county council, right, is – is in – unable to go and say, hey, PRO, you’re doing a bad job. Which leaves us with the prosecuting attorney as, perhaps, the only other person could go and say, hey, you know, “tow the line” public records officer.

But that’s not going to happen, because the prosecuting attorney, on May 20<sup>th</sup> 2015, was the one redacting that file. They have an interest in – in – in how that case is going to turn out and whether that redaction is proper. So we lose entirely the checks placed on the public records officer in – in government.

RP 9/15/16 at 11.

An explanation of the good faith basis was reiterated in Mr.

Kilduff’s pleadings when he advised the Court:

Plaintiff has alleged: 1) The PRO is subordinate to both the County Manager and the County Council.  
2) Mr. Stephens was appointed to his position of PRO by his subordinate, County Manager Thomas.  
3) The two remaining councilors Bob Jarman and

Rick Hughes<sup>5</sup> produced a report that essentially exonerated the County's post-public records request division of the Hughes enforcement file. And, 4) that the division of the Hughes enforcement file was done at the direction of Prosecuting Attorney Randall Gaylord which of course is a disincentive for him to remove Mr. Stephens by virtue of a prosecutor's special authority under the *quo warranto* statute.

Such a strange state of affairs forms a good faith and factually supportable basis for Plaintiff's complaint and request for assistance from the Court. This is because there was no official who had authority over Stephens to ask him to step down as PRO, and because his co-Councilors and the Prosecuting Attorney were conflicted, Plaintiff acted in an entirely appropriate and reasonable manner.

CP at 342.

The trial court dismissed Mr. Kilduff's complaint ruling that since he had not utilized the County's appellate procedure set forth in SJCC 2.108.130 there had been no final action which allowed judicial review under RCW 42.56.550. The Court further ruled that Mr. Kilduff's prayer for ouster was frivolous and sanctionable as he did not have standing to initiate an ouster claim under the *quo warranto* statute. CP 363, 364-374.

### **III. ASSIGNMENT OF ERRORS**

The trial court erred when it held that Mr. Kilduff was required to exhaust and had failed to exhaust administrative remedies prior to suing and that review was not ripe. The trial court further erred when it dismissed the ouster claim against Mr. Stephens. The trial court further erred when it sanctioned Mr. Kilduff and his attorneys for bringing the

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<sup>5</sup> Council Member Hughes is unrelated to the Hughes who are the parcel owners burdened by the wetland.

ouster claim, and imposing sanctions of \$10,000 jointly on Mr. Kilduff and his attorneys.

#### **IV. ISSUES RELATED TO ASSIGNMENT OF ERRORS**

1. Can an agency that is subject to RCW 42.56 establish its own administrative review process that must be exhausted prior to the right to sue under the PRA when an agency has indicated that the final responsive records have been tendered, the request is complete, and that the request has been closed?
2. When evidence shows that a prosecutor has an interest in the underlying dispute that has motivated a claim for ouster, is a request for expansion or exception to the rules limiting private claims for ouster so contrary to existing law that a good faith request for such modification or exception can be sanctioned under CR 11 or found to be frivolous pursuant to RCW 4.84.185?
3. Did the trial court err in dismissing the PRA and ouster claims and imposing sanctions on Kilduff and his attorneys?

#### **V. ARGUMENT**

##### **A. An Agency Cannot Require a Requester to Use the Agency's Internal Administrative Review as a Prerequisite for Judicial Review.**

The trial court's sole ground for dismissing Mr. Kilduff's PRA claim is that he did not utilize the administrative review process the County had been established by local ordinance prior to suing the County.

This appeal squarely addresses a question of first impression. Namely, whether an agency can establish its own internal administrative appellate process that must first be exhausted before the jurisdiction of superior courts can be invoked. Because San Juan County's administrative review process is contrary to the express provisions of the

PRA, its policy and binding case law, this Court should not hesitate to reject this proposition.

The PRA provides citizens access to judicial redress for a wrongful withholding. The PRA states in relevant part:

Upon the motion of any person *having been denied* an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.

RCW 42.56.550(1). (Emphasis supplied).

WAC 44-14-04004 provides that a "denial" of a request can occur when an agency: 1) Fails to respond to a request; 2) Claims an exemption of the entire record or a portion of it; or 3) Without justification, fails to provide the record after the reasonable estimate of time to respond expires.

Here it is undisputed that Mr. Kilduff did not receive all the records that were responsive to his request. For just one example the May 12, 2015 email authored by Colin Maycock (CP 298-299) discussed above, was not provided to Mr. Kilduff despite the fact that it was certainly responsive since it was a correspondence that was clearly related to the IGA and code enforcement file and in existence at the time of Mr. Kilduff's request.

Moreover, when on July 27, 2016 (CP 114) the County supplied additional materials to Mr. Kilduff after the lawsuit was commenced it evidently did not search their files and produce Mr. Kilduff with responsive documents. Rather, what the County apparently did was

supply Mr. Kilduff with the contents of a later-prepared litigation file. This is established because the hand-written notations on a memorandum dated January 22, 2015 from Annie Matsumoto-Grah to Officer Laws are in the **handwriting of Appellant's counsel**, Nicholas Power. CP 109, RP 2/17/17 at 82-85. So at least some of the documents in this post-suit tender were the content of a later-assembled litigation file and not the records that Mr. Kilduff had requested. In blunt terms, the County was giving back to Appellant's counsel's his own documents that he had filed in another case and advocated the manifest falsehood that these documents were from the County's enforcement files when it is clear that they were not.

Indeed, the trial court would have had to find that Mr. Kilduff had prevailed on the merits, but for its determination that the San Juan County's ordinance placed an exhaustion requirement on requesters before they seek judicial relief.

San Juan County's unique procedural burden attempts to divest courts of jurisdiction granted by the Legislature and requesters of their right to judicial access and thus is contrary to the express provisions of the PRA.

While a municipality may enact an ordinance touching on the same matter as a state law, it can only do so if that state law is not intended to be exclusive and the ordinance does not conflict with the general law of the state. *King County v. Taxpayers of King County*, 133 Wash.2d 584, 611,

949 P.2d 1260 (1997); *Brown v. City of Yakima*, 116 Wash.2d 556, 559, 807 P.2d 353 (1991). Thus, an ordinance is unconstitutional if a state enactment preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the ordinance and a statute which cannot be harmonized. *King County*, 133 Wash.2d at 612, 949 P.2d 1260; *Brown*, 116 Wash.2d at 559, 807 P.2d 353.

Section 2.108.130 of San Juan County's Code reads in full:

**Administrative review of actions by public records officer.**

A. Any person who objects to the denial of a request for a public record, the closure of a public records request or the reasonable estimate of the charges to produce copies of public records may petition for prompt review of such action by tendering a written request for review to the prosecuting attorney for the County. The written request shall specifically refer to the written statement by the public records officer or other staff member which constituted or accompanied the action taken.

B. Immediately after receiving a written request for review of a decision of the public records officer, the prosecuting attorney shall request a response from the public records officer or other person who responded to the request. The prosecuting attorney will immediately consider the matter and either affirm or reverse such action within two business days following the receipt of the written request for review of the action.

C. Administrative remedies shall not be considered exhausted until the prosecuting attorney has made a written decision, or until the close of the second business day following receipt of the written request for review of the action of the public records officer, whichever occurs first.

D. For purposes of the public disclosure laws, the action of the public records officer becomes final only after the review conducted under this section has been completed. **No lawsuit to review the action taken, compel the production of a public record, or impose a penalty or attorney fees shall be brought**

**before the administrative remedies set out in this section have been exhausted by the party seeking the record.** (Ord. 14-2017 § 4; Ord. 9-2015 § 8; Ord. 6-2005 § 13).

(Emphasis supplied).

The trial court found that SJCC 1.108.130 was a duly enacted ordinance pursuant to RCW 42.56.520. It is not, however, because it in conflict with RCW 42.56.520 which reads:

Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives **shall establish mechanisms for the most prompt possible review of decisions denying inspection**, and such review shall be deemed completed at the end of the second business day **following the denial of inspection** and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

RCW 42.56.520.

What RCW 42.56.520 contemplates is an agency's own **internal review** of its recent denial; it does not delegate authority for agencies to mandate a process for appeals by requesters. That is, Section 520 is designed to encourage the agency itself to check its denials, not to place a barrier to requestor exercising their statutory rights to sue the agency in court.

The key provision of the statute that requires this reading is that the review needs to be completed "at the end of the second business day following the **denial of the inspection.**" Were this statute intended to govern appeals by requesters rather than a self-check by the agency, the requester would necessarily have to both perceive the grounds for and

lodge a request for review almost instantly to give the agency a chance at being able to conduct a review which must, per Section 520, be completed “by the end of the second business day following the denial of inspection”.

It is unrealistic to think that the Legislature intended requesters to instantly object<sup>6</sup> to an incomplete or otherwise deficient tender and then have the agency be able to evaluate the legitimacy of the denial within two days.

Rather, the purpose of Section 520 is to create a two-day safe-harbor before a response is deemed final to allow agencies to conduct a final check to make sure that the tender or denial that the agency provided actually comports with the agency’s understanding of what should be made available to the requester. It does not grant agencies the right to create additional barriers to suit, or require requestors to utilize or exhaust the agency’s “home-grown” post-denial administrative appeals processes. This argument was timely raised by Appellant in briefing before the trial court. See, CP 262-277, 323-335.

Appellant’s interpretation of Section 520 is not a novel one. The Washington Supreme Court has held that such a two-day grace period following a denial is just that—a two-day grace period in which *the agency itself* should conduct a review of an initial denial and have safe-harbor from suit if an error had been made. In *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 884 P.2d

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<sup>6</sup> Indeed Section 520 provides no time period for a requester to make their objection, only a deadline for a determination that is based on the original date of denial.

592 (1994) (“PAWS”), the Supreme Court held that former RCW 42.17.320, which has since been re-codified verbatim in Section RCW 42.56.520, “encourages prompt *internal agency review* of actions taken by an agency's public records officer. It also provides that, *regardless of internal review, initial decisions become final for purposes of judicial review after 2 business days.*” PAWS, 125 Wn.2d at 253. (Emphasis supplied).

This conclusion further comports with the WACs promulgated for state agencies. Specifically, WAC 44-14-080 reads:

**Review of denials of public records.**

(1) **Petition for internal administrative review of denial of access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing (including email) to the public records officer for a review of that decision. The petition shall include a copy of or reasonably identify the written statement by the public records officer or designee denying the request.

(2) Consideration of petition for review. The public records officer shall promptly provide the petition and any other relevant information to (public records officer's supervisor or other agency official designated by the agency to conduct the review). That person will immediately consider the petition and either affirm or reverse the denial within two business days following the (agency's) receipt of the petition, or within such other time as (name of agency) and the requestor mutually agree to.

(3) (Applicable to state agencies only.) Review by the attorney general's office. Pursuant to RCW 42.56.530, if the (name of state agency) denies a requestor access to public records because it claims the record is exempt in whole or in part from disclosure, the requestor may request the attorney general's office to review the matter. The attorney general has adopted rules on such requests in WAC 44-06-160.

**(4) Judicial review. Any person may obtain court review of denials of public records requests pursuant to RCW 42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal.**

(Emphasis added).

The WAC specifically recognizes that while a requester “may”<sup>7</sup> choose to lodge a petition for an internal review with the agency, such is not required and specifically does not forestall a requester from seeking judicial review since suit can be brought regardless of the status of that review.

It was therefore error for the trial court to have found that Section 520 acts to delegated authority to agencies to create an administrative review process that is contrary to those provided by state law. Indeed, administrative review is not designed to rectify issues of law, but issues of fact. As explained in *Retail Store Employees Local 1001 v. Washington Surveying & Rating Bur.*, 87 Wn.2d 887, 906, 558 P.2d 215 (1976), “the principle [of administrative review] is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges.”

Here, the County has unquestionably manifested that it has tendered all the records it was going to tender to Mr. Kilduff—there is nothing more to determine factually. The question then becomes one of law -- whether or not the County has fully complied with the PRA. This

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<sup>7</sup> It is worth noting that SJCC 2.108.130 is likewise permissive and uses the term “may” in subsection 1. SJCC 1.04.010 provides that for the purposes of the County’s Code, the term “‘may’ is permissive” and “‘must’ and ‘shall’ are mandatory.”

notion comports with the court's *de novo* review of an agency's tender as expressly authorized by RCW 42.56.550. Cf. *Zink v. City of Mesa*, 140 Wn. App. 738, 166 P.3d 738 (2007) ("While agencies have some discretion in establishing procedures for making public information available, the provision for *de novo* review confirms that courts owe no deference to agency interpretation of the [PRA].")

The County simply does not have the authority to add to the conditions that must be met before it can be sued by a requester. Subsection D of SJCC 2.108.130 attempts to directly abrogate a requester's rights pursuant to state law, specifically, those embodied in RCW 42.56.550(1) and .520. SJCC 2.108.130 is thus unlawful and violates state law.

Moreover, the County's and the trial court's reliance on *Hobbs v. State*, 183 Wn. App 925, 335 P.3d 1004 (Div. II, 2014), is misplaced since it is factually distinguishable and actually supports Appellant's position, not Appellees'. In *Hobbs*, a requester requested public records from the State Auditor's Office that included a "large amount of technical information relating to the requested records." *Id.* at 929. The Auditor responded acknowledging the request and stating that the records would be transmitted in installments. The requester received an installment, but did not wait for the promised installments, and instead brought suit in superior court.

On appeal, the *Hobbs* court held, "Under the PRA, a requester may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a record," and, though not specifically defined, "**a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.**" *Id.* at 935-36. (Emphasis supplied).

*Hobbs* reasoned that RCW 42.56.550(1) permits superior courts to hear motions to show cause "when a person has `been denied an opportunity to inspect or copy a public record by an agency,'" and looked at other provisions within the PRA, such as RCW 42.56.520, which refers to "'final agency action or final action.'" *Id.* at 936, (emphasis omitted) (quoting RCW 42.56.550(1), .520). *Hobbs* concluded that the plain language of the statute dictates that "being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA." *Id.* at 936-37. *Hobbs* held "that the Auditor was continuing to provide Hobbs with responsive records until March 1," and, "[t]herefore, there could be no `denial' of records forming the basis for judicial review." *Id.* at 936-37. Accordingly, *Hobbs* held that the superior court did not err in dismissing the Hobbs's PRA suit against the Auditor. *Id.* at 946.

In the present case there was no manifestation that the County was still in the process of continuing to supply Mr. Kilduff with responsive records.

Even were Prosecutor Gaylord to have somehow understood Mr. Kilduff to have limited his request in the telephone call he had with Mr. Kilduff on May 28, 2015, that allegation is undermined not only by the difference in testimony as to what transpired during on the phone call and the brevity of the call (less than four minutes as established by phone records), but also the fact that no confirmation of this “agreement” or modification was ever memorialized<sup>8</sup> with Mr. Kilduff. This is especially salient since, on June 2, 2015—some 5 days *after* the purported agreement had supposedly been reached on the phone—Records Clerk Rogers emailed Mr. Kilduff and made no reference to the purported agreement reached but rather stated:

In response to your public records request received on 5/20/15, attached copies of all documents, correspondence, memos, statements, reports, and other contents of the SJC DCD code enforcement file # PCI-INQ-15-003.

**Please expect the response to your request for copies of all documents, memos, statements, reports, correspondence and other records associated with the investigation of improper governmental action, related to the above reference code enforcement file (Hughes wetland issue, Mike Thomas Investigation) in another 2 weeks, I will let you know if there will be any delays.**

CP 19. (Emphasis supplied).

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<sup>8</sup> This is contrary to the practice suggested in WAC 44-14-04003(4) which provides in relevant part: “**Communicate with requestor.** Communication is usually the key to a smooth public records process for both requestors and agencies.<sup>2</sup> Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request. If a requestor asks for a summary of applicable charges before any copies are made, an agency must provide it. RCW 42.56.120 (2)(f). The requestor may then revise the request to reduce the number of requested copies. **If the request is clarified or modified orally, the public records officer or designee should memorialize the communication in writing.**” (Emphasis supplied).

In other words, *even after the phone call of the 28<sup>th</sup>*, the County was still manifesting to Mr. Kilduff that *it was processing his request in its original form* without any consideration of the purported limitation and that he was going to receive a fully responsive tender to his initial request.

Finally, Clerk Rogers' June 12, 2015 email to Mr. Kilduff stated that the attached documents were "[i]n final response to your public records request and that the email and its attachment "fulfills your public records request." CP 78. This is a clear manifestation of the "final agency action" spoken of in *Hobbs* and Mr. Kilduff was free to bring a claim for judicial review two days after that denial. The County cannot lawfully impose an internal appeal on Mr. Kilduff before he was allowed to sue.

In conclusion, there is no legal basis for the County to establish a mandatory administrative appeals process that a requester must first exhaust. And the factual record clearly establishes that the County manifested to Mr. Kilduff that he would be receiving no more records and there had been final agency action. Judicial review was therefore available to Mr. Kilduff. Based on the undisputed evidence in the record that Mr. Kilduff did not receive all responsive records before he sued, and still has not received all responsive records from the County, the trial court erred in granting judgment in favor of the County, and not granting it to Mr. Kilduff.

**B. The Sanctions Imposed Relating to the Ouster Claim Should be Reversed.**

Appellant's second claim of error is that the trial court imposed sanctions pursuant to CR 11 and RCW 4.84.185 on Mr. Kilduff and his attorneys for bringing a frivolous claim. Here, Mr. Kilduff made a good faith argument that was well grounded in both fact and law why the usual rule that only a prosecuting attorney or a person with a claim to the target office may seek ouster should be relaxed under the present circumstances.

**1. RCW 4.84.185 Requires the Entire Case to be Frivolous.**

For RCW 4.84.185 to apply, it is well settled that the entire lawsuit must be frivolous before fees may be awarded. *Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 129, (1992). Cf. *State ex rel. Quick Ruben v. Verharen*, 969 p.2d 64 136 Wash.2d 888 (1998), *Jeckle v. Crotty*, 85 P.3d 931, 120 Wash.App 374 (Div. III, 2004), *Building Industry Ass'n v. McCarthy*, 218 P.3d 196, 152 Wash.App.720 (Div. II, 2009). The *Biggs* court went on and removed any doubt as to how RCW 4.84.185 should be applied stating, "[n]othing in the legislative history shows that the Legislature intended to change the statute to allow for attorneys' fees on a claim by claim basis." *Id.* at 134-136.

As discussed in-depth below Mr. Kilduff's ouster claim was not frivolous. But even if it were, the trial court only concluded that Mr. Kilduff's ouster claim was frivolous but made no similar finding with respect to his PRA claim. CP 371-373. Accordingly, sanctions pursuant

to RCW 4.84.185 are not warranted as the entire case was not found to be frivolous.

## **2. CR 11 Sanctions are not Warranted.**

Unlike RCW 4.84.185, CR 11 need not apply to the totality of the action but provides courts with flexibility to tailor sanctions to curb abusive practice. CR 11 provides, in part, that:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry **it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....** If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

The leading case on CR 11 is *Bryant v. Joseph Tree, Inc.* 119 Wn. 2d 210, 829 P.2d 1099 (1992). The *Bryant* court stated:

CR 11 is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 199. The Ninth Circuit has observed that:

‘Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons

whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.’

*Bryant* at 219, quoting *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363-64 (9th Cir.1990). “Complaints which *are* "grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" are not "baseless" claims, and are therefore not the proper subject of CR 11 sanctions.” *Bryant* at 220-221. The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 111, 780 P.2d 853 (1989).

Mr. Kilduff’s ouster claim is based on the long-standing common law rule prohibits the same person from simultaneously holding two offices that are incompatible with each other. *Kennett v. Levine*, 50 Wn.2d 212, 216, 310 P.2d 244 (1957). “Offices are incompatible when the nature and duties of the offices are such as to render it improper, from consideration of public policy, for one person to retain both.” *Id.* The question is whether the functions of the two offices are “inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest.” *Id.* at 216-17, (internal quotation marks omitted).

This Court has recognized that applying the doctrine of incompatibility is exceedingly difficult in many cases: “The question of

what is compatible and what is incompatible is often difficult of solution, and the principles upon which its solution depends cannot always be stated with exactness. Throop on Public Officers (1892), 37, § 33. This must of necessity be so, inasmuch as what public policy should be, and what is, detrimental to the public interest may, in many instances, be subject to a legitimate difference of opinion.” *Kennett*, 50 Wn.2d at 217.

When one office is subordinate to another, an incompatibility exists. Washington’s Attorney General’s Office has opined on various situations where incompatibilities exist. For example, a member of the board of a fire protection district could not also serve as board secretary. AGO 59-60 No. 157. Similarly, a city fireman could not be a city or town council member. AGO 1973 No. 24. And, under the same approach, in AGO 63-64 No. 92 the AGO concluded that a county commissioner may not simultaneously serve as the chairman of a local civil defense council.

Plaintiff indeed amply alleged a factual basis—namely that Mr. Stephens does, in fact, occupy two incompatible offices—and sought relief from the Court in good faith. Mike Thomas, the County Manager, is Mr. Stephens’ boss in Mr. Stephens’ role of Public Records Officer. Mr. Stephens as a County Commissioner is Mr. Thomas’s boss. Thus, Mr. Stephens is his boss’s boss.

The County essentially admitted to the incompatibility of the two offices held by Mr. Stephens in the September 2016 trial court hearing and

represented to the trial court that Mr. Stephens would be replaced as the Public Records Officer during the next budget year. RP 9/15/16 at 14. This, in fact, never occurred and despite this representation to the court, Mr. Stephens remains the County's Public Records Officer to this day—more than two years later—and still supervised by County Manager Thomas in that position, while Mr. Stephens as a County Commissioner continues to have the power to fire and discipline County Manager Thomas, his boss.

The legal aspect of the ouster claim is a bit more nuanced. Mr. Stephens argued that Mr. Kilduff did not have an adequate legal basis for making a claim for ouster against him since the *quo warranto* statute provides standing only to the prosecutor or someone who claims an interest in the office.

The standing statute for *quo warranto* actions in RCW 7.56.020 reads:

The information may be filed by the prosecuting attorney in the superior court of the proper county, upon his or her own relation, whenever he or she shall deem it his or her duty to do so, **or shall be directed by the court or other competent authority**, or by any other person on his or her own relation, whenever he or she claims an interest in the office, franchise, or corporation which is the subject of the information.

(Emphasis supplied).

The trial court, failed to recognize Plaintiff's good-faith—and, from inception, very forthright—prayer for modification of existing law. First, it should be noted that the bolded section reproduced above clearly

suggests that a suit or other application to the court might be brought which could result in the “court or other competent authority” to direct an ouster claim to be initiated by the Prosecuting attorney—relief that Mr. Kilduff sought here.

Despite the doctrine of incompatibility’s long existence its application is illusive for a variety of factual circumstances presented in this case. Even under the most straightforward circumstances, the AGO has recognized these are fairly uncharted waters. The AGO recently stated, “because there are so few cases in Washington addressing the incompatible offices doctrine, it is extremely difficult to predict how a court would rule on this issue.” See, *Kennett*, 50 Wn.2d at 217 (“The question of what is compatible and what is incompatible is often difficult of solution.”) (citing *Throop on Public Officers* (1892), 37, § 33).” AGO 2016 No. 7 (June 7, 2016). And that “we caution that a court could reasonably reach the opposite conclusion.” *Id.*

Mr. Kilduff did not interpose his ouster claim in an effort to cause harm to Mr. Stephens or for another improper purpose. To the contrary, the public is entitled to have a Public Records Officer who is free from conflict and whose other loyalties might make the simultaneous occupancy of both of his offices improper. The factual circumstances of this case are unique, and the public policy preventing an elected county council member to also serve as an appointed and subordinate officer are real and palpable.

Mr. Kilduff immediately acknowledged to the trial court that *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 896, 969 P.2d 64 (1998), held that courts have generally interpreted the *quo warranto* statute, RCW 7.56.010, to require a specific interest in the office alleged to be illegally occupied. CP 279. But Mr. Kilduff also went on to provide an analysis as to *why* such a rule should be limited or modified in this instant case.

The Attorney General indicated that there may well exist a more lenient rule for standing when it comes to privately seeking ouster when the doctrine of incompatible offices is raised:

The final part of your first question asks about the remedy available if two offices are incompatible. One option of course is that the official in question could resolve the matter by choosing which of the two offices he or she prefers and then resigning from the other office. If this does not happen, there are other options. Where a person is legally ineligible to serve in two offices, state law provides a remedy through the courts, in the form of a *quo warranto* action. RCW 7.56.010. The county prosecuting attorney may bring a *quo warranto* action to test the entitlement of any person to hold office. RCW 7.56.020; *State ex rel. Quick-Ruben v. Verharen*, 136 Wn. 26 888, 896, 969 P.2d 64 (1998). It is also possible for a private party to bring a private *quo warranto* action, although this seems **unlikely** in this context because a private action is available only to a person who claims an interest in the office. *Id.* at 896. **Additionally, the only Washington case on incompatible offices arose on facts involving an appointed office from which a city mayor could remove an appointee with city council approval.** *Kennett*, 50 Wn.2d at 213. In situations like that, in which the law vests some authority with the power to remove an officeholder, the use of that procedure could be an appropriate remedy for a violation of the doctrine of incompatible offices.

AGO 2016 No. 7 (June 7, 2016).

As Appellant explained in his briefing and at oral argument below, in this case everyone at Mr. Stephens' level of authority is conflicted as is his inferior (Manager Thomas) who appointed Stephens and presumably could terminate him. Since the County Manager Thomas has appointed his superior Stephens to be his inferior, it cannot be left just to the Manager to resolve this conflict. Nor will Prosecutor Gaylord use his authority to remove Mr. Stephens as he has refused to do so even in the years after this suit was filed, and even after the County committed to the trial court more than two years ago in open court in this case that it would be replacing Mr. Stephens as PRO but two years later still has failed to follow through on that commitment.

In 2016 when he filed this lawsuit, Mr. Kilduff was left with no option but to sue to seek court resolution of this clear conflict. Mr. Kilduff was both factual and legally justified to make a good faith attempt to seek an exception to the law regarding the application of the *quo warranto* standing rules in this case, and therefore should not have been sanctioned for doing so.

**C. Kilduff is Entitled to an Award of Fees and Costs under the PRA and as a Prevailing Party in this Appeal.**

RCW 42.56.550(4) of the PRA provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action .

Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.” *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005); *see also Am. Civil Liberties Union of Washington (“ACLU”) v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999). The PRA does not allow for court discretion in deciding **whether** to award attorney fees to a prevailing party. *Progressive Animal Welfare Society v. University of Washington (“PAWS I”)*, 114 Wn.2d 677, 687-88, 790 P.2d 604 (1990); *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). The only discretion the court has is in determining the *amount* of reasonable attorney’s fees. *Amren*, 131 Wn.2d at 36-37.

The Supreme Court in *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees— “[including] fees on appeal”—to the requester. Should Kilduff prevail on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the PRA and RAP 18.1.

Under RCW 42.56.550(4), a public records requestor who prevails against an agency in a PRA claim is entitled to mandatory reasonable attorney’s fees, all costs, and a daily penalty of up to \$100 per day which can be imposed per page. *Wade’s Eastside Gun Shop v. Labor and Industries*, 185 Wn.2d 270, 372 P.3d 97 (2016). Appellees here failed to

perform an adequate search for records in violation of the PRA, silently withheld numerous records in violation of the PRA, and failed to timely cite exemptions and provide an adequate withholding log for these silently withheld records.

The record in this case from the Show Cause proceeding documented that there were records that existed, that were responsive to the request, and yet were not produced, and that no explanation of exemption or withholding was made. The trial court's sole basis for dismissal and judgment for the Defendant was its conclusion that Mr. Kilduff was obligated to follow the County's additional administrative appeal process prior to suing, not that the records had been produced or that they were exempt. This Court thus could on this record further deem Kilduff the prevailing party on those additional claims (silent withholding, lack of proper explanation or statement of exemption, lack of adequate search) in this appeal and rule that he is entitled to an award or reasonable attorney's fees, all costs, and statutory penalties in amounts to be determined by the trial court after subsequent briefing and hearing by the trial court and remand to the trial court for this additional trial court fee, cost and penalty award once all responsive records have been produced.

At a minimum, Mr. Kilduff must be awarded his fees and costs for the work on this appeal to reverse the improper judgment for the Defendant and award of sanctions to the Defendants from Mr. Kilduff and his attorney.

## VI. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court, award Mr. Kilduff his fees and costs on appeal and remand for further proceedings on his PRA claim, including an appropriate award of fees, costs and penalties at the trial court level and an order compelling the County to produce records which still have not been produced.

Respectfully submitted this 22nd day of January, 2019.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that today I e-filed and delivered a copy of the foregoing **Brief of Appellant** in addition to the **four volumes or Reports of Proceedings** by email pursuant to an electronic service agreement among the parties to the following:

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\_\_\_\_\_  
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### Comments:

This is an amended brief which corrects certain typographical errors and adds a section on fee and cost recovery to Appellant's brief that was filed earlier in the day. It is timely.

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