

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION I

RUSSELL L. PHILLIPS,)	Case No. 63876-9
)	
Appellant,)	APPELLANT'S BRIEF
)	
vs.)	
)	
VALLEY COMMUNICATIONS,)	
)	
Respondent.)	

Appeal for the King County Superior Court
Cause # 09-2-16309-0 KNT
The Honorable Jay V. White

**BRIEF OF PLAINTIFF-APPELLANT,
RUSSELL L. PHILLIPS**

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**APPELLANT BRIEF
TABLE OF CONTENTS**

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

ASSIGNMENT OF ERROR 6

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 7

STATEMENT OF THE CASE. 9

ARGUMENT 26

 I. The purpose and public policy embodied in the PRA strongly favors open government, full disclosure of public records, and the limited use of exemptions to deny disclosure...... 26

 II. Any redundancies in Mr. Phillips PRA requests were caused by Valley Com’s failures to properly follow the law when responding to earlier PRA requests made by Mr. Phillips......29

 III. A Show Cause hearing is the method for achieving judicial review of a public agency’s denial to fulfill its requirement under the PRA...... 42

 IV. A Show Cause hearing is the method for achieving judicial review of a public agency’s denial to fulfill its requirement under a court ordered judgment...... 42

 V. The Court incorrectly applied res judicata to Mr. Phillips’s Motion to Show Cause.43

 VI. Rule 11 sanctions should not have been granted against Mr. Phillips for filing his Motion to Show Cause and for moving the Court to Disqualify Valley Communication’s counsel....52

CONCLUSION55

TABLE OF AUTHORITIES

<i>Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405</i> , 164 Wn.2d 199 189 P.3d 139 (2008)	37
<i>Blair v. GIM Corp.</i> , 88 Wn. App. 475, 945 P.2d 1149 (1997)	52, 53
<i>Bordeaux v. Ingersoll Rand Co.</i> , 71 Wn.2d 392, 429 P.2d 207 (1967)	44
<i>Brouillett v. Cowles Publ'g Co.</i> , 114 Wn.2d 788, 791 P.2d 426 (1990)	37
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992)	52, 53, 54
<i>Citizens for Fair Share v. State Dep't of Corr.</i> , 117 Wn.App. 411, 72 P.3d 206 (2003)	49
<i>Daines v. Spokane County</i> , 111 Wn.App. 342 (2002)	39
<i>Doe v. Washington State Patrol</i> , 80 Wn.App. 296, 908 P.2d 914 (1996)	32, 33, 34, 38
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978)	47
<i>Lind v. Lind</i> , 63 Wn.2d 482, 387 P.2d 752 (1963)	41
<i>MacDonald v. Korum Ford</i> , 80 Wn. App. 877, 912 P.2d 1052 (1996)	53
<i>Mellor v. Chamberlin</i> , 100 Wn.2d 643, 673 P.2d 610 (1983)	42, 43
<i>Miller v. Badgley</i> , 51 Wn. App. 285, 753 P.2d 530 (1988)	52
<i>O'Neill v. City of Shoreline</i> , 145 Wn. App. 913, 187 P.3d 822 (2008)	47
<i>Rental Housing Assoc'n of Puget Sound v. City of Des Moines</i> , 165 Wn.2d. 525 (2009)	44, 51
<i>Rufener v. Scott</i> , 46 Wn.2d 240, 280 P.2d 253 (1955)	44

<i>Schoeman v. New York Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986)	43
<i>Seattle-First Nat'l Bank v. Kawachi</i> , 91 Wn.2d 223, 588 P.2d 725 (1978)	43, 44
<i>Smith v. Okanogan County</i> , 100 Wn.App. 7, 994 P.2d 857 (2000)	32,38
<i>Spokane Research & Defense Fund v. City of Spokane</i> , 155 Wn.2d 89 (2005)	40, 45
<i>State ex rel. QuickRuben v. Verharen</i> , 136 Wn.2d 888, 969 P.2d 64 (1998)	52, 53
<i>Tiberino v. Spokane County</i> , 103 Wn. App. 680, 13 P.3d 1104 (2000)	47
<i>Wood v. Thurston County</i> , 117 Wn.App 22, 68 P.3d 1084 (2003)	40
<i>Yacobellis v. City of Bellingham (Yacobellis I)</i> , 55 Wn. App. 706, 780 P.2d 272 (1989)	31, 37

ASSIGNMENTS OF ERROR

1. The Court erred in dismissing Russell Phillips's Motion to Show Cause in its ruling on June 19, 2009.
2. The Court erred in awarding CR 11 sanctions against Russell Phillips in its ruling on November 2, 2009.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Under Washington's Public Records Act, RCW 42.56, does a violation of the Act occur when the public agency fails to respond to a request within 5 days of receiving the request?
2. Is the Show Cause hearing the method for achieving judicial review of a public agency's denial to fulfill its requirement under the Public Records Act?
3. Is the Show Cause hearing the method for achieving judicial review of a public agency's denial to fulfill its requirement under a court ordered judgment?
4. Was the application of res judicata to the Motion to Show Cause filed by Mr. Phillips an incorrect application of that doctrine?
5. Should Court Rule 11 sanctions been granted against Mr. Phillips for filing his Motion to Show Cause and for moving the Court to Disqualify Valley Communication's counsel?

STATEMENT OF THE CASE

RUSSELL PHILLIPS EMPLOYMENT WITH VALLEY COMMUNICATIONS

From January of 2005 until November of 2006, the appellant, Russell Phillips (hereinafter "Mr. Phillips"), was employed as a 911-call receiver by the respondent, Valley Communications (hereinafter "Valley Com"), which operates the 911 dispatch center for most of the southern part of King County. (CP-3) On November 21, 2006, Mr. Phillips's employment was terminated by Valley Com. His termination was allegedly in response to his being found "unfit for duty" by a psychiatrist employed by Valley Com. (CP-3) However, Mr. Phillips maintains that he was wrongfully terminated in retaliation for continuing to demand an investigation into an incident where his supervisor ordered him to falsify a police incident. (CP-3)

As a result of Mr. Phillips's outspoken stance on this issue, and a misunderstood e-mail, the administration ordered him to be evaluated by a psychiatrist, Dr. Kathleen Decker. (CP-189) Mr. Phillips met with Dr. Kathleen Decker on October 11, 2006. (CP -190) The psychiatrist told him that barring something unusual in his file that would send up "big red flags," she felt certain that she would be reporting that he was fit for duty. Therefore, Mr. Phillips was shocked to get Director Chris Fischer's

November 3, 2006, letter with Dr. Decker's report saying that while the e-mail was not meant as a threat, Mr. Phillips was "unfit for duty" for the position.

During the first show cause hearing, Valley Com was ordered to release a copy of the October 13, 2006, preliminary report from Dr. Kathleen Decker, the psychiatrist that performed Mr. Phillips's fitness for duty evaluation. (CP- 418) In the preliminary report, Dr. Decker states that she would not discuss accommodations or treatment recommendations during the first, and only, in person contact that she had with Mr. Phillips, "as the condition(s) have not been adequately diagnosed." (CP – 278) Dr. Decker further states that she was in need of "the following information to complete the evaluation: pre-employment psychological evaluation and if possible, a random drug test of Mr. Phillips. Thus, it is difficult with the information provided to conclusively state what the nature of Mr. Phillips's condition is at the time. I request a copy of his pre-employment psychological evaluation and the results of drug testing to ascertain whether external substances are contributing to increased performance difficulties." (CP – 277)

Dr. Decker ends the preliminary report with the following request: "I look forward to your response and to receiving the two pieces of additional information needed to complete this evaluation. In the event

such information is lacking, a final report will be generated based on evidence and clinical information available, with the most probable conclusions.” (CP – 278)

On November 3, 2006, Mr. Phillips received a letter from Valley Com Director Chris Fischer terminating his employment, stating: “keep in mind it is these two issues: failure to adequately perform and lack of fitness for the position that are the only relevant considerations at this time.” (CP – 384) The hearing was scheduled for November 14, 2006 to allow Mr. Phillips the ability to present his case to the administration. (CP – 384) In order to prepare his defense for the hearing, on November 9, 2006, Mr. Phillips requested his complete personnel, medical, and investigatory files, including any communication to or from Dr. Decker and all information provided to her to use in conducting the evaluation. (CP – 22) Mr. Phillips requested his personnel file from Valley Com in order to know what medical criteria the doctor used and all information given to the doctor so Mr. Phillips could defend his employment at the hearing. (CP-247) However, Valley Com failed to provide complete records in a timely manner, which greatly handicapped Mr. Phillips’s ability to defend his employment at the hearing. (CP – 22)

After his termination, Mr. Phillips made a number of requests for records from Valley Com pursuant to Washington’s Public Records

Act (hereinafter the "PRA" or the "Act") in order to investigate and document the circumstances surrounding his termination. (CP: 20 – 109)

MR. PHILLIPS'S FIRST PETITION FOR JUDICIAL REVIEW

On January 29, 2008, Mr. Phillips filed a Motion to Show Cause (Petition for Judicial Review) with the King County Superior Court in order to contest Valley Com's claimed exemptions, replies, responses, disclosures, and other actions in response to Mr. Phillips's multiple PRA requests. A series of proceedings followed that lasted many months. Most importantly, the Court issued an Order on Public Records Act: Exemptions on May 12, 2008. (CP-415) The Court ruled in the Order that Valley Com had violated the PRA by claiming exemptions for records that did not apply on nine requests for disclosure. (CP-415-22) Valley Com was ordered to disclose those documents within five business days of the Order. (CP-421)

VALLEY COM'S PAST VIOLATIONS OF THE PRA

On February 15, 2008, Judge Yu ordered Mr. Phillips and Valley Com to both Bates number the records that they claimed were responsive to Mr. Phillips's PRA requests and provide them to the Court to use in making its' ruling. (CP – 299) Judge Yu specifically ordered, the following:

“In addition, the court shall review each claimed exemption asserted by Defendant through an in camera review of the relevant documents. Documents shall be bates stamped so that a uniform numbering system can be utilized which will facilitate review and keep the record clear for appellate purposes.” (CP – 299)

Months after the Court’s May 12, 2008 ruling on exemptions, Mr. Phillips discovered a document entitled: “Defendant’s List of Documents Produced to the court. Utilized by the court to determine outstanding requests and claimed exemptions,” that had been filed by the Court after discovering that Valley Com had failed to file it properly with the Court Clerk’s office. (CP 282 -289) Valley Com also failed to serve the records on Mr. Phillips. The document consists of an index of the Bates numbered documents that Valley Com had claimed as being exempt from disclosure. On January 19, 2009, Mr. Phillips entered a PRA request seeking five of the records from that index:

“Valley Com Bates numbered documents #347, 348, 349, 350, and 351. These were all claimed as being exempt as application information. However, the dates for each of them show 2006 as the year they were created. Mr. Phillips was hired in 2005; therefore, none of these could have been application information. Even if it were application material, it was his application material. Privacy could not be an issue for withholding the records. Ms. Beisheim’s referring to my high school diploma in an email does not make the document exempt under RCW 42.56.250.” (CP-681)

Valley Com responded on February 12, 2009, with the following:

“Legal Counsel originally identified these documents as ‘application information’ and advised Valley Com to withhold these documents under RCW 42.56.250. The director and I have reviewed them and have determined there is no reason to not release these documents. Therefore, they are being released to you today, 2/12/09.” (CP-113)

Mr. Phillips received the five documents, all of which were responsive to a number of his PRA requests, stretching back to December 5, 2006. (CP-114 - 118) Valley Com stated in their Exhibit 21 table that, “Bates #347-351 available for Judge’s review but did not order disclosed.” (CP – 914) Not one of the five had ever been claimed as exempt in any of Valley Com’s response letters nor did Judge Yu rule on them on May 12, 2008, as being one of the claimed exemptions. (CP 415 – 421) Because Valley Com did not file the Bates’ stamped documents as Judge Yu ordered, we have no idea if these documents are the ones that were given to Judge Yu or not. We do know that these five documents were “silently” withheld by Valley Com and had the Court not discovered Valley Com’s failure to file the index and then filed it on May 13, 2008, Mr. Phillips would have never known of the index’s or the records’ existence. (CP 282 – 289) Ms. Lawrence claims that these records “were never technically withheld because while his requests were being processed, Phillips clarified that he

only wanted ‘any and all’ records referencing him which related to his investigation and his termination, which these did not.” (CP – 551) Even if Ms. Lawrence assessment of Mr. Phillips February 7, 2007, request were true, it still doesn’t explain why the records were not provided in response to Mr. Phillips December 5, 2006 requests for all documents that name him. (CP-30, 38 - 40)

VALLEY COM’S CONTINUING VIOLATIONS OF THE PRA

On June 20, 2008, Mr. Phillips entered eighteen separate public disclosure requests: “Per WAC 44-14-04004(2), I am requesting to inspect the requested records and will choose which ones I will need copies of.” (CP 64 - 65) On August 1, 2008, Valley Com responded to his request by refusing to allow him to inspect all responsive records, instead stating that they would rather mail him copies. (CP 68 - 70) Valley Com then refused to include copies of records that they claim were already in his possession stating,

Since you are already in possession of documents which were served on you, sent to you, originated from you, or which you identified as having, Valley Com assumes that you do not need duplicate copies of these. (CP – 69)

This intentional nondisclosure of records Valley Com stipulates are not statutorily exempt violates RCW 42.56.070 that states agencies shall make

available for public inspection and copying all public records, unless the record falls within the specific exemptions of Subsection 6 of this Section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

The second item of the eighteen Mr. Phillips requested was, “the January 18, 2007, e-mail that attorney Amy Plenefisch billed Valley Com for sending to Russ Phillips.” (CP – 64) Valley Com replied that communications between Valley Com and its attorneys are exempt from disclosure and, “This includes the email you appear to be requesting in item #2 which was only sent to Ms. Henneke. As you know, I did not send you any email or letter despite the confused wording on the billing record.” (CP – 68) Valley Com’s January 29, 2007, response letter to Mr. Phillips’s December 5, 2006 requests states the following:

“To the extent to which your request may include documents created since the date of your request, any records relate to your grievance, your public records request and the appeal of your Employment Security. They are exempt as material not available to a party to a controversy and/or under attorney client privilege and work-product. These documents are dated December 5, December 6... *January 18* and

January 19.” (CP – 40) (emphasis added).

When the previous Court ordered Valley Com to provide the record to the court for an in camera review, Valley Com told the court that no records from January 18, 2007 had been withheld. (CP - 465) On May 12, 2008, Judge Mary Yu had issued the court’s ruling on claimed exemptions by Valley Com that stated: “January 18, 2007, there are no documents dated January 18, 2007.” (CP – 420) However, in response to Mr. Phillip’s PRA request on August 1, 2008, Valley Com claimed the email was once again exempt from disclosure. (CP – 68) Valley Com stipulates in their Responses to Show Cause Motion that the records Mr. Phillips has sought judicial review on were provided to him after the time for an appeal had expired: (CP – 564)

The Court’s final order occurred on 11/10/08. The time for any appeal would have run after 12/10/08. As explained below, all documents responsive to Phillips’s 8/25/08 request were made available to him well within the estimated timeframe, the vast majority of them (if not all) being promptly provided to Phillips on 11/10/08, the same date as the Court’s final order. (CP – 564, 565)

Valley Com will later say that the final order was entered on May 12, 2008. (CP - 1147) That means that Valley Com’s responses to Mr. Phillips August 24, 2008, request that occurred in two parts; the first on November 10 and then the remaining records on December 26, 2008,

occurred well after the May 12, 2008, final order.

On June 20, 2008, Mr. Phillips entered a PRA request for:

“I am requesting the opportunity to inspect all letters sent to Ms. Cathleen Robertson acknowledging her public disclosure requests as well as all response letters... all documents that were provided to Ms. Robertson in response to her requests....All emails/letters/correspondences between Liz Henneke and Cathleen Robertson from January 1, 2007, to June 19, 2008.

I am requesting the opportunity to inspect a copy of the public disclosure index/Public Records Act log book/or any document that shows the date Cathleen Robertson informed Valley Com she was canceling her January 18, 2007, request for Russ Phillips’ files.” (CP - 64)

Attorney Amy Plenefisch, sent Valley Com’s response on August 1, 2008:

“Item #7. No such documents exist. Communications were verbal and request was canceled prior to any documents being provided.
Item #8. ...4/19/2007 CAD message...
Item #9. No such documents exist. Cancellation was verbal. (CP – 68)

Attorney Amy Plenefisch’s response that no documents were ever provided to Cathleen Robertson contradicts Ms. Plenefisch’s own earlier testimony:

“In response to her request, she was provided with her records without removal or deletion of items, but with the legally appropriate redactions typical for public documents.” (CP – 406)

When Mr. Phillips brought attention to the contradictions in Ms.

Plenefisch's statements, Ms. Lawrence quickly stated the following:

“In reviewing Mr. Phillips' declaration it has come to the attention of Valley Com that an incorrect draft of Ms. Plenefisch's declaration was inadvertently submitted to this Court. Attached is Ms. Plenefisch's declaration to correct the record. The correction does not materially change the substance of the record. Her declaration continues to refute the allegations about Valley Com's involvement with her protective order.” (CP - 484)

Valley Com stated that Ms. Plenefisch had attached a revised declaration with the pleading, but none was actually provided. (CP – 484) Ms. Plenefisch would not enter a revised declaration until after Mr. Phillips entered a motion for sanctions against Ms. Plenefisch and Ms. Lawrence for the large number of contradictory and dishonest statements found throughout the pleadings. (CP – 430, 431) Ms. Lawrence responded in the September 29, 2008, Declaration of Eileen M. Lawrence:

“I have never made any false statements to this court or any other court, and if any facts came to light that would require a correction, I would notify the court of the same.

Despite this, I acknowledge my former assistant may have filed the incorrect draft of Ms. Plenefisch's declaration on February 8, 2008. I was not aware of this until we began preparing a reply to Phillips' response to Valley Com's Motion for Protective Order, on September 11, 2008. At that time, Ms. Plenefisch pointed out that a different version of her declaration than she had finalized had been filed. Both versions of her declaration contained accurate

information, to my knowledge, and there was little substantive difference between the two.” (CP – 438)

Valley Com argued that there was no reason to review the contradictory statements made by Ms. Plenefisch. “Ms Lawrence has sufficiently explained how this occurred, has corrected the record and apologized to the Court.” (CP – 457) Valley Com claimed that the *Phillips I* Court should not review any of the requests made after the May 12, 2008, final order as those requests had nothing to do with the present litigation:

“The sentences relate only to whether Ms. Robertson requested and was given a copy of her personnel file. What Ms Robertson requested and what she was given is completely immaterial to Mr. Phillips' public record requests and the present litigation.” (CP – 457)

The explanation provided by Valley Com concerning Ms. Plenefisch's declaration is not quite accurate according to Ms. Plenefisch's revised declaration:

“On February 7, 2008, I signed a declaration in the above captioned case. When reviewing Russ Phillips' September 10, 2008 declaration, in which he quotes from my declaration, I discovered that a different draft of my declaration had been submitted to the Court from the version that I signed. I am submitting this declaration to correct the record. On page 3 of the version of my declaration submitted to the Court, two sentences at ll. 21 -24 refer to documents provided to Ms. [Robertson]. (‘In response to her request, she was provided with her records without removal or deletion of items, but with the legally appropriate redactions typical for public documents. Had Ms. Robertson requested her

personnel file pursuant to statute, no redactions would have been necessary.’) These sentences were not in the version that I signed. I cannot attest to those sentences. I do not recall her requesting any documents from her personnel file. I do not know that any records were ever provided to Ms. Robertson.” (CP – 430 & 431)

On August 3, 2008, Mr. Phillips entered a PRA request stating:

“I am requesting access to inspect a copy of the communications described below pursuant to Chapter 42.56 RCW: ‘He kept violating the directive not to communicate with Valley Com employees by send e-mails to Ms. Fischer trying to explain his intent with the original e-mail.’” (CP – 85)

While Valley Com’s response letter to his June 20, 2008 requests is dated August 1, 2008, Mr. Phillips did not receive the response until August 5, 2008. In the response, Valley Com stipulates that it is not disclosing ninety-four records it admits are not statutorily exempt. (CP 68 – 82) Valley Com will not allow Mr. Phillips to verify that the records they claim are already in his possession, are in fact already in his possession; nor do the statutes of the Public Records Act require him to do so. Wanting to know what Valley Com was basing their claim of knowledge as to what documents he has in his possession, on August 6, 2008, Phillips requests the indexes that records’ custodian declared to have maintained of all of his record requests. (CP 89 – 90) At the end of the August 6 letter, Phillips reminds Ms. Lawrence of her responsibilities: “I hope that the

agency will not choose to ignore its responsibility to respond within 5 business days to my new requests.” (CP – 90)

Valley Com failed to respond to Mr. Phillips’ August 3, 2008 PRA request until August 18, 2008. (CP – 86) The response from Valley Com leaves no doubt that they were very aware that they had violated the PRA’s requirement that an agency respond to a request within five-business days, and their failure to do so would make Mr. Phillips the prevailing party if he chose to file suit: (RCW 42.56.520)

“In your email dated August 4, 2008, you have asked about a statement in Ms. Beisheim’s declaration referencing emails sent from you to Ms. Fischer. Only Ms. Beisheim can confirm what email she was referencing to; no public record exists which answers your question...I have confirmed with Valley Com that any and all responsive e-mails have previously been provided to you and that no “later discovered” emails exist. Thus, there are no responsive documents which have not been provided to you previously and no documents to provide you under WAC 44-14-04007.” (CP 86 – 87)

Yet, during the June 19, 2009 *Phillips II* hearing, Ms. Lawrence knew exactly which record was requested and that they refused to provide to Mr. Phillips and kept from being reviewed by Judge Yu. “[S]omehow the copy of that e-mail was not provided to the Court and in the notebooks. And apparently there was an oversight.” (Verbatim Report at 57.) “Somehow” is Ms. Lawrence admitting that she did know the identity of

the e-mail described in the HR Director's declaration.

“One example was he wanted to get an explanation of what documents Susan [Beisheim] was referring to in one of her declarations in that prior litigation. That's not information that Valley Com is required to provide.” (Verbatim Report at 58.)

Mr. Phillips was not asking for an explanation of what document Susan Beisheim was referring to in her declaration. Mr. Phillips was clear when he stated, “I am requesting access to inspect a copy of the communications described below pursuant to Chapter 42.56 RCW.” (CP – 85) Despite Mr. Phillips citing the statute he was making the request under at the beginning of his letter, Valley Com's August 18, 2008, response states:

“...you have asked about a statement in Ms Beisheim's declaration referencing emails sent from you to Ms Fischer. Only Ms Beisheim can confirm what emails she was referring to; no public record exists which answers your question.” (CP – 86)

Instead of admitting that it had failed to respond Mr. Phillips August 3, 2008 request within five-business days, Valley Com decides to claim that the August 3, 2008 PRA record request is not really a request for a record, but a request for clarification and information instead.

“The email asked about a reference, contained in a witness statement from prior litigation, to an email sent by Phillips to Valley Com. Valley Com reasonably viewed this as a response to its August 1 letter and as a request for clarification about the content of the declaration, not as new public record request.” (CP – 560)

Valley Com, who had the *Phillips I* Court order Mr. Phillips to only go through attorney Eileen Lawrence's office with PRA requests while the case was being heard, ignored Mr. Phillips' PRA request. (CP – 299) The agency openly admits that the ninety-four records were subject to disclosure, but because they claim Mr. Phillips already had the records in his possession, they have refused to provide the records. (CP - 69)

Valley Com has complied with the requirement that documents be made "available" to requester. RCW 42.56.080. Unlike the cases cited by plaintiff, Valley Com did not refer Phillips to some other agency which might also have possession of the records. Instead it pointed out that the documents were already available to him because he already had them. (CP – 558)

VALLEY COM'S ON-GOING VIOLATIONS OF THE PRA

Attorney Eileen Lawrence told the *Phillips II* Court that:

“As was previously disclosed to you in response to your June 20, 2008 request there were no written response from Liz Henneke to Cathleen Robertson's April 19, 2007 CAD mail. Ms. Robertson withdrew her request for records shortly after this CAD mail so nothing was produced in response to any of her email/CAD mail. Her requests were not top priority during this period of time and an communication on my part was verbal.” (CP – 502)

In its August 1, 2008 response, Valley Com refused to disclose ninety-four records that it stipulated were responsive to Mr. Phillips's requests and

were not exempt from disclosure. (CP-68 - 82) In Ms. Plenefisch's August 1, 2008, response letter, Valley Com justifies their intentional nondisclosure of records stating:

“Enclosed are copies of the non-exempt records requested that are not already in your possession...Many of the records you have requested are already in your possession from your prior public record requests or through previous litigation...Since you are already in possession of documents which were served on you, sent to you, originated from you, or which you identified as having, Valley Com assumes that you do not need duplicate copies of these.” (CP-68)

Valley Com did not cite any statutes when claiming the ninety-four records were being withheld from disclosure. (CP-68) Instead, Valley Com stated that the ninety-four responsive records were being withheld based on Valley Com's determination that the records were already “in your possession.” (CP-69)

MR. PHILLIPS'S SECOND PETITION FOR JUDICIAL REVIEW

On April 17, 2009, Mr. Phillips filed a second Motion to Show Cause (Petition for Judicial Review) with the King County Superior Court regarding Valley Com's responses to his PRA requests. On April 29, 2009, Mr. Phillips filed a Motion to Disqualify Valley Com's Attorney of Record, Eileen M. Lawrence. On May 22, 2009, the Court dismissed Mr. Phillips's Motion to Disqualify Valley Com's Attorney, reserving

determination on the issues of sanctions and attorney's fees for the Show Cause Hearing. The Court conducted a hearing on Mr. Phillips's Motion to Show Cause and Valley Com's Motion for Dismissal on June 19, 2009. The Court denied Mr. Phillips's Motion to Show Cause and granted Valley Com's Motion for Dismissal, holding that the claims raised by Mr. Phillips were barred by res judicata and collateral estoppel. The Court again reserved ruling on the issues of CR 11 sanction and attorney's fees for a later date. On November 2, 2009, the Court ruled that Mr. Phillips's second Motion to Show Cause was neither grounded in fact or law and Mr. Phillips's Motion to Disqualify Valley Com's Counsel of Record was filed for an improper purpose. The Court ruled, therefore, that CR 11 sanctions were appropriate.

ARGUMENT

I. THE PURPOSE AND PUBLIC POLICY EMBODIED IN THE PRA STRONGLY FAVORS OPEN GOVERNMENT, FULL DISCLOSURE OF PUBLIC RECORDS, AND THE LIMITED USE OF EXEMPTIONS TO DENY DISCLOSURE.

The PRA contains provisions that expressly state its purpose and the public policy it was enacted to further:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the

instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.56.030.

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

RCW 42.56.550(3).

The opinions of the appellate courts interpreting the public policy of the PRA are numerous and expressed in the strongest of terms:

The stated purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the [PRA], government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, “A popular Government, without popular information, or the means or acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”

Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS II) 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (internal citations omitted); Am. Civil Liberties Union of Wash v. Blaine Sch. Dist. No. 503 (ACLU I) 86 Wn.App. 688, 696, 937 P.2d 1176 (1997)(“Access is the underlying theme of the Act”); Yacobellis v. City of Bellingham (Yacobellis II), 64

Wn.App. 295, 301, 825 P.2d 324 (1992)(holding that the PRA’s “primary purpose is to promote broad disclosure of public records.”). While the Court is certainly familiar with the language of the PRA, the public policy behind it, and the case law explaining the PRA’s purpose, repeating these well-known words once again is necessary when the Court is being asked—as it is here—to create an exemption to the disclosure of public records that does not exist anywhere in the law.

At the core of this appeal is Valley Com’s unlawful creation of a new exemption to the PRA. On many occasions, Valley Com refused to disclose public records that were identifiable, responsive to Mr. Phillips’s requests, and not claimed as exempt from disclosure for any of the reasons given in the PRA or any other statute. Valley Com refused to disclose these records because they were purportedly “already in [Mr. Phillips’s] possession.” “Enclosed are copies of the non-exempt records requested that are not already in your possession.” (CP – 68); “Since you are already in possession of documents which were served on you, sent to you, originated from you, or which you identified as having, Valley Com assumes that you do not need duplicate copies of these.” (CP – 69) “As previously explained, this document is already in your possession.” (CP – 91) “Any such ‘index’ is already in your possession.” (CP – 91) “You have already reviewed all the documents you previously requested and

have been provided copies documents subject to release under the Public Records Act.” (CP – 98). The sole piece of legal authority used by Valley Com to justify its refusal to disclose records that it alleges were already in the possession of the requester is the opinion of Daines v. Spokane County. The case at bar is easily distinguishable from the holding in Daines v. Spokane County due to a large number of factual differences that are discussed in detail below.

II. ANY REDUNDANCIES IN MR. PHILLIPS’S PRA REQUESTS WERE CAUSED BY VALLEY COM’S FAILURES TO PROPERLY FOLLOW THE LAW WHEN RESPONDING TO EARLIER PRA REQUESTS MADE BY MR. PHILLIPS.

The PRA requires state and local agencies to make public records available promptly when such records are requested under the Act. If records cannot be made available within five business days of the date of the request, the PRA requires that the agency to send a written response to the requestor, followed by disclosure of the requested records when they become available. RCW 42.56.520. An agency may respond to a PRA request in one of four ways. First, the agency may provide access to or copies of the requested record(s). Id. Second, the agency may ask the requestor to clarify the request. Id. Third, the agency may acknowledge receipt of the request and provide a reasonable estimate of the time

necessary to make the records available. Id. Fourth, an agency may deny the request and provide an explanation of the reasons for the denial. Id.

The case at bar contains multiple instances of Valley Com failing to properly respond to PRA requests made by Mr. Phillips. In response to Mr. Phillips' December 5, 2006 requests, Valley Com told Mr. Phillips he could expect a response by December 22, 2006. (CP – 34) On December 20, 2006, Valley Com told Mr. Phillips that he could expect the final response by January 31, 2007. (CP – 37) Mr. Phillips was allowed to review responsive records on February 7, 2007, but Valley Com refused to allow him to have copies of the records he had indicated he wanted copies of that day. (CP – 41) Mr. Phillips did not receive the records responsive to his December 5, 2006, requests until March 3, 2007; 71 days longer than Valley Com's first estimate and 31 days longer than their second estimate. Mr. Phillips' March 30, 2007, requested his own personnel file in response to Valley Com's allegations made during his unemployment benefits hearings that were going on at this same time that claimed he had been terminated for misconduct and not because he had been found unfit for duty as Valley Com had claimed in his termination letter. (CP - 51) Valley Com responded on April 4, 2007, that Mr. Phillips should provide the agency with the "legitimate business reason" why he needed to personally review his personnel file because Valley Com was "engaged in

the important task of responding to emergency calls from those in our service area and we cannot permit this matter to continue to interfere with that objective.” (CP – 52) Mr. Phillips did not had never been disciplined for misconduct while working for Valley Com, yet Valley Com was telling the Employment Securities Department court that he had actually been terminated for misconduct. Mr. Phillips’ requests for own his personnel file should have been treated as if he were asking for someone else’s personnel file – if any disciplinary files showing misconduct existed, the agency would have to release them. Valley Com would not respond properly by saying that no disciplinary files showing misconduct existed in Mr. Phillips files because it would have shown the testimony being given by Valley Com in Mr. Phillips Employment Securities Department hearings was not truthful. Valley Com waited 14 days before responding to Mr. Phillips’ August 3, 2008, PRA request. (CP – 86) Under Washington’s Public Records Act, RCW 42.56, an agency is in violation of the Act when it fails to respond within 5 days of receiving the request. Doe v. Washington State Patrol, 80 Wn.App. 296, 303, 908 P.2d 914 (1996) (holding that an agency that had not responded within five business days of receiving the request had violated the PRA and could not be the prevailing party in an injunction case). In Smith v. Okanogan County, 100 Wn.App. 7, 13, 994 P.2d 857 (200), an agency completely

failed to provide a five-day response to a records request and the court ruled that this was a per se violation of the PRA. The court found that the agency failed “to comply with the strict requirements of RCW 42.17.320[RCW 42.56.520].” Failure to provide a written response within the five-day period results in a civil award of statutory penalties. See RCW 42.56.550(4) The need for agencies to respond in some manner to requests within the five-day time-period is well understood in light of the facts of this case. When an agency fails to respond to request, neither disclosing the records at issue nor claiming that the records are exempt from disclosure, the well-defined procedures of the PRA are thrown into disarray. The confusion that results from an agency’s failure to act easily leads to redundant claims from requestors as they seek some form of clarity.

If an agency decides upon the fourth option, denying the request, it is required to provide a detailed explanation of the reasons for denial.

RCW 42.56.520. In PAWS II, the court held:

The Public Records Act "is a strongly worded mandate for broad disclosure of public records". The Act's disclosure provisions must be liberally construed, and its exemptions narrowly construed Courts are to take into account the Act's policy "that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others". The agency bears the burden of proving that refusing to disclose "is in accordance with a statute that

exempts or prohibits disclosure in whole or in part of specific information or records". Agencies have a duty to provide "the fullest assistance to inquirers and the most timely possible action on requests for information".

The court in PAWS II held that an agency withholding records from a requestor was required to provide an index of each withheld record and the exemption being claimed. The reason for the index is to provide the requestor with knowledge of the content of the response. If the requestor cannot understand the agency's response—what was disclosed, what was withheld and why—then the requestor finds it hard to be either satisfied with the response or to challenge the response, because he or she is then unclear as to the nature and reasoning behind the refusal.

In 2005, the Legislature asked the Attorney General to provide guidance to both records requestors and agencies on the public records process by drafting Model Rules on Public Disclosure, WAC 44-14 et seq. When applying exemptions to deny the disclosure of public records, the Model Rules require an agency to take the following steps:

Records exempt from disclosure. Some records are exempt from disclosure, in whole or in part. If the (name of agency) believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt

portions, and indicate to the requestor why portions of the record are being redacted.

WAC 44-14-040(5).

Mr. Phillips made numerous requests for indexes to the exemptions and redactions Valley Com applied in its responses to his requests. In her March 5, 2008 declaration, Record Custodian, Liz Henneke, stated,

“I retained copies of all the documents that were reviewed as potentially responsive and maintained notebooks of those that were provided to him, including those that he requested copies of after he reviewed them.” (CP – 424)

On August 6, 2008, Mr. Phillips entered a new PRA request seeking:

“2. Valley Com has denied me access to inspect any record it claims to know I am in possession of. Therefore, I am asking for [1] Valley Com's index detailing which records I have been provided a copy of for each of my public disclosure requests as well as [2] the index detailing which records from the Auburn Police department inspection time that I did not receive copies of.” (CP 90)

Attorney Amy Plenefisch's August 12, 2008, response contradicted the declaration of Valley Com's record custodian: “Item #2. No such indexes exist except the one provided to you on August 1, 2008. You are in possession of that index.” (CP – 91) Just over a month later, on September 29, 2008, Attorney Eileen Lawrence entered her own declaration containing statements that contradicted Ms. Plenefisch's claims: “The portion of the index which referred to all the previously

disclosed documents was given to Mr. Phillips before or at the time of the hearing.” (CP 434)

Valley Com time and again failed to produce such indexes as are indicated in the authorities above. After the May 12, 2008 Final Order of the court with respect to Valley Com’s use of exemptions in response to PRA requests made prior to the first round of litigation, Valley Com released an index that was prepared for the court for its *in camera* review of records from the first round of litigation. (CP 464 – 467) This index was different from the index Mr. Phillips discovered online that the *Phillips I* Court had filed when it discovered Valley Com had failed to file it. (CP 282 – 289) Now Mr. Phillips was aware of two indexes that Valley Com wanted the judge to have, but violated the Court rules when they failed to serve Mr. Phillips with the indexes or file them with the Court Clerk’s office. Valley Com would tell the Court that they had created indexes and were in possession of said indexes, yet denied that these same indexes existed the moment Mr. Phillips entered new PRA requests for them. (Verbatim Report at 47)

As a result of the ever changing claims regarding the indexes, on August 24, 2008, Mr. Phillips entered a PRA request stating:

“Since Valley Com has not created an index of the records, I am requesting the opportunity to inspect every document that Valley Com is claiming to have provided me through

public disclosure. This is to make sure that I am actually in possession of them. Ms. Henneke has stated in her declarations that she has copies of every document that I have been provided, and the court requested copies of all documents Valley Com has claimed were responsive to my public disclosure requests, so this should not drain too many resources.” (CP – 93)

Valley Com did not responded to Mr. Phillips’ August 24, 2008, request until September 2, 2008. Once again, Ms. Lawrence failed to respond within 5 business days. (CP – 98, 99) Valley Com attempted to avoid responding to this PRA request by seeking a protection order against Mr. Phillips, but it was denied. If Valley Com had all of the indexes of requested records that they claimed to have, this request should have taken two days to compile at the most. Valley Com did not respond to this request with its’ first installment of records until November 10, 2008 – the day the *Phillips I* Court made its ruling on penalties. Valley Com provided Mr. Phillips with 1243 records, many of them heavily redacted, and not a single statute was cited to justify the exempted information. On November 17, 2008, Mr. Phillips sent Valley Com a letter asking why Valley Com was intentionally withholding 485 records that they stipulated were not exempt from disclosure. (CP – 95, 96, 97) Valley Com responded on November 20, 2008, that it would need at least 30 days to review the records. (CP – 102) These were supposedly the records Valley Com provided to the *Phillips I* Court that they stipulated to not being

exempt from disclosure. At the time, it made no sense that Valley Com would need thirty days before they could respond. The reason for the delay became clear on December 26, 2008, when Mr. Phillips received Valley Com's final installment to his August 24, 2008 request. (CP 103 – 109) Valley Com waited until the time frame for any appeal to be filed by Mr. Phillips had expired before sending its' response:

“I have reviewed the documents you identified by Bates stamp number in your letter of November 17, 2008. The majority of the documents specified were non-responsive to your prior requests, but because you now appear to be requesting them, they are being provided to you. Most of the remaining documents are duplicates of documents provided to you under a different Bates stamp number or in an un-stamped version, or are the original non-redacted version of redacted documents provided to you under a different Bates number. The Court approved the redactions, therefore only the redacted versions are required to be released. I am providing an index cross referencing these duplicate withholdings, most of which are exempt under attorney-client privilege or work product. I am also providing you with copies of any non-duplicate documents that, although Valley Com believes have been previously provided to you or in your possession, you indicated by Bates number you did not receive. There are no documents with Bates number higher than 1728.” (CP -103)

Mr. Phillips' request was for every responsive record for any PRA request that he had entered. There should not be any records that are not responsive to his requests (CP – 93) The *Phillips I* Court's February 15, 2008 order instructed Valley Com to gather the responsive records as, “the Court shall review each claimed exemption asserted by Defendant through

an in camera review of the relevant documents.” (CP – 299) When the Court ordered Valley Com to produce all claimed exemptions, Valley Com provided the Court with 73 pages (33 claimed exemptions). (CP 365 – 371) Of those 73 pages of claimed exemptions, 17 pages were ruled as being improperly claimed as exempt. That leaves only 56 pages of Court approved exempted records. That means out of the 1728 pages of responsive records, only 56 pages were ruled as being exempt. Valley Com stipulates that the records provided in this second installment to Mr. Phillips’ August 24 PRA request were not part of the records reviewed in camera. (CP 103) All of those were claimed exemptions. That means that all of these exemptions are non-claimed, or “silent” withholdings. The *Phillips I* Court’s ruling also listed any of the records that were duplicates of each other. (CP 369, 371) That means if Judge Yu did not rule that a record had duplicates, no duplicates exist. Valley Com providing Mr. Phillips only 1243 records on November 10, 2008, shows that the agency failed to provide him with 429 records that were not exempt from disclosure. Judge Yu ruled on the redacted information of nine (9) records, consisting of 18 pages. (CP 688 – 689). Yet in Valley Com’s second installment, they claim over 60 pages of records contained “redactions approved by Court.” (CP 104 – 109) Valley Com violated the PRA by failing to properly index and explain its response to Mr. Phillips’s

public records requests, specifically those records that it refused to disclose or redacted.

Valley Com violated the PRA by claiming an exemption from disclosure for records “already in your possession.” The “in your possession” exemption neither exists in the language of the statute nor adheres to the purpose and policy of the PRA, favoring the disclosure of public records and limiting the use of exemptions to deny record requests. The agency seeking to prevent disclosure bears the burden of proof of establishing that a statute permits the record to be withheld. RCW 42.56.550(1); Brouillett v. Cowles Publ’g Co., 114 Wn.2d 788, 794, 791 P.2d 426 (1990) (“The agency must shoulder the burden of proving that one of the act’s narrow exemptions shields the records it wishes to keep confidential.”) A governmental agency withholding a public record bears the burden of establishing 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.” Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 209, 189 P.3d 139 (2008). Arguably, the agency’s burden of proof extends beyond proving why a record is exempt; the agency also bears the burden of proving that it did not violate the PRA. Yacobellis v. City of Bellingham (Yacobellis I), 55 Wn.App. 706, 711, 780 P.2d 272 (1989) (holding that

when agency did not claim exemption from disclosure but rather “lost” requested record, “the burden of proof is on the agency to justify its failure to disclose”).

Valley Com has certainly failed to meet to burden for show that a number of its claimed exemptions were allowed under the PRA. Of particular note is the January 18, 2007, e-mail that attorney Amy Plenefisch billed Valley Com for sending to Mr. Phillips. The story on whether or not this e-mail actually exists keeps changing and it fails to qualify as an exemption to the Act.

In addition, Mr. Phillips entered a PRA request seeking Valley Com Bates numbered documents #347, 348, 349, 350, and 351 on January 19, 2009. On February 12, 2009, Valley Com decided that its previous claim of exemption was invalid and released the records. (CP-205):

“Legal Counsel originally identified these documents as ‘application information’ and advised Valley Com to withhold these documents under RCW 42.56.250. The director and I have reviewed them and have determined there is no reason to not release these documents. Therefore, they are being released to you today, 2/12/09.” (CP-205).

The agency openly admits that the ninety-four records were subject to disclosure, but because they claim Mr. Phillips already had the records in his possession, they have refused to provide the records. (CP - 69)

Valley Com has complied with the requirement that

documents be made "available" to requester. RCW 42.56.080. Unlike the cases cited by plaintiff; Valley Com did not refer Phillips to some other agency which might also have possession of the records. Instead it pointed out that the documents were already available to him because he already had them. (CP – 558)

On September 2, 2008, Valley Com responded: “Valley Com does not believe that it is required to continue to provide additional copies or respond to duplicate requests. Daines v. Spokane County, 111 Wn.App. 342 (2002).” (CP – 99) However, when Valley Com sought a protective order in King County Superior Court, arguing that it was not required to produce additional or duplicative records, pursuant to the holding in Daines v. Spokane County, it was denied on September 22, 2008. Unlike the Daines case, when Mr. Phillips entered his PRA requests, he was not in possession of the records he is now seeking judicial review on, as Valley Com silently withheld them until after the statute of limitations for an appeal had expired. In Spokane Research & Defense v. City of Spokane, 155 Wn. 2d 89 (2005), prejudgment disclosure of records does not moot the later review and award of penalties, if records had been improperly withheld at the outset. The merits of a claim for fees and penalties are based on the circumstances that existed at the time of the record request, which is not changed by subsequent disclosure of documents.

III. A SHOW CAUSE HEARING IS THE METHOD FOR ACHIEVING JUDICIAL REVIEW OF A PUBLIC AGENCY'S DENIAL TO FULFILL ITS REQUIREMENT UNDER THE PRA.

A Show Cause hearing is the method for achieving judicial review of a public agency's denial to fulfill its requirements under the PRA. "[S]how cause hearings are the usual method of resolving litigation under [the PRA]" Wood v. Thurston County, 117 Wn.App 22, 27, 68 P.3d 1084 (2003). In each of the above described violations of the PRA by Valley Com: (1) Valley Com Bates numbered documents #347, 348, 349, 350, and 351; (2) the disappearing and exempted reappearing e-mail from January 18, 2006; (3) the numerous "already in your possession" exemptions; are properly reviewed by the court in a Show Cause Hearing.

IV. A SHOW CAUSE HEARING IS THE METHOD FOR ACHIEVING JUDICIAL REVIEW OF A PUBLIC AGENCY'S DENIAL TO FULFILL ITS REQUIREMENT UNDER A COURT ORDERED JUDGMENT.

Seeking the enforcement of a judgment is traditionally accomplished by the aggrieved party filing a Motion to Show Cause with the court that issued the judgment, then serving the Order to Show Cause upon the party that has allegedly failed to abide by the judgment. Lind v. Lind, 63 Wn.2d 482, 387 P.2d 752 (1963).

RCW 7.21.010 defines contempt of court as follows:

Contempt of court means intentional:

- (a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;
- (b) Disobedience of any lawful judgment, decree, order, or process of the court;
- (c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or (d) Refusal, without lawful authority, to produce a record, document, or other object.

V. THE COURT INCORRECTLY APPLIED RES JUDICATA TO MR. PHILLIPS'S MOTION TO SHOW CAUSE.

The Courts have ruled that two lawsuits do not involve the same subject matter simply because they both arise out of the same set of facts. Indeed, in Mellor v. Chamberlin, 100 Wn.2d 643, 673 P.2d 610 (1983), a case in which a single real estate transaction produced two lawsuits, the Court so held. In the first of those lawsuits, a buyer of land contended that the seller had misrepresented the extent of the property included in the sale. That lawsuit was settled and an order of dismissal with prejudice was thereafter entered. Shortly thereafter, the buyer brought a second lawsuit claiming that the seller breached a covenant of warranty. The buyer prevailed in that action on the theory that an adjoining landowner's encroachment onto the property breached the seller's warranty of quiet and peaceful possession. On appeal, the seller contended that the issue in the second lawsuit should have been raised in the first and, because it was not,

the second lawsuit was barred by res judicata. In ruling against the sellers, the Court held that "[a]lthough both lawsuits arose out of the same transaction (sale of property), their subject matter differed" and the second suit was therefore not barred by res judicata. Mellor, 100 Wn.2d at 646.

"Res judicata does not bar claims which arise out of a transaction separate and apart from the issue previously litigated." Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 860, 726 P.2d 1 (1986) (citing Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 226, 588 P.2d 725 (1978)).

Neither the doctrine of res judicata nor collateral estoppel are intended to deny a litigant his day in court. The purpose of both doctrines is only to prevent relitigation of that which has previously been litigated. The doctrine of res judicata is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation. Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 429 P.2d 207 (1967). The party asserting either doctrine has the burden of proof to show that the determinative issue was litigated in the former proceedings. "The party asserting collateral estoppel has the burden of showing that issues are identical and that they were determined on the merits in the first proceeding." Rufener v. Scott, 46 Wn.2d 240, 280 P.2d 253 (1955).

In Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 226, 588 P.2d 725 (1978), the plaintiff argued that since neither the pleadings nor the instructions in the first cause of action were presented for the jury's consideration the claims upon which the appellant sought to recover in the second cause of action.

Rental Housing Assoc'n of Puget Sound v. City of Des Moines, 165 Wn. 2d. 525 (2009) not been adjudicated in the first cause. The respondents maintain, however, that the claims should be barred because they could have been decided in that suit. The Court conclude that the claims asserted in the second trial, arising as they did out of transactions entirely separate and apart from the claim adjudicated in first trial, were not necessarily involved in that adjudication and were not barred under the doctrine of res judicata. Does the doctrine of collateral estoppel foreclose the assertion of these claims? That doctrine, as we have said, precludes the retrial of issues decided in a prior action. Is that doctrine invoked by the fact that these claims were in controversy in that action, even though they were not in issue and were not adjudicated? The answer is that it is not. Not only were the claims not adjudicated, but they and the evidence concerning them formed no essential part of the claim at issue in that action, but were introduced as facts from which the existence of one of the

elements of the cause of action could be inferred. They constituted what is commonly termed "evidentiary facts."

While it is often said that a judgment is res judicata of every matter that could and should have been litigated in the action, this statement must not be understood to mean that a plaintiff must join every cause of action that is joinable when he brings a suit against a given defendant. CR 18(a) permits joinder of claims. It does not require such joinder. And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause that is independent of the cause that was adjudicated. 50 C.J.S. JUDGMENTS 668 (1947); 46 Am. Jur. 2d JUDGMENTS 404 (1969). A judgment is res judicata as to every question that was properly a part of the matter in controversy, but it does not bar litigation of claims that were not in fact adjudicated. Likewise, and most importantly, the Court has stated that res judicata *does not bar* judicial review. Spokane Research & Defense Fund v. City of Spokane (*Spokane Research IV*), 155 Wn.2d 89 (2005) (emphasis added).

The *Phillips I* court made its final ruling in May of 2008. After receiving written statements from Valley Com's attorney that contradicted the declaration that attorney had entered with the court, Mr. Phillips sought sanctions against Ms. Lawrence and Ms. Plenefisch. Ms. Lawrence told the *Phillips I* Court that in Valley Com's responding to Mr.

Phillips's June 20, 2008, requests that, "The sentences relate only to whether Ms. Robertson requested and was given a copy of her personnel file. What Ms. Robertson requested and what she was given is completely immaterial to Mr. Phillips's public records requests and the present litigation." In her October 8, 2008 Order on Plaintiff's Motion for Sanctions, Judge Yu denied the motion ruling, "The parties should note that this matter was originally before the court on the Civil Motions Calendar regarding a public disclosure request. There is no independent cause of action that has been individually assigned to this department." (emphasis added) The *Phillips I* Court refused to address the motion because the final ruling had been entered already; similar to the explanation given by the *Phillips II* Court for refusing to address Mr. Phillips supplemental motion to show cause.

An e-mail message is a "writing" under the PRA. O'Neill v. City of Shoreline, 145 Wn. App. 913, 923, 187 P.3d 822 (2008) E-mail messages of public officials or employees are subject to a public record request if the e-mails contain information related to the conduct of government. Tiberino v. Spokane County, 103 Wn. App. 680, 688, 13 P.3d 1104 (2000).

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 interpretations of the PRA, but are charged with determining when a duty to disclose exists and whether a statutory exemption applies. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 130, 580 P.2d 246 (1978). Mr. Phillips asked the court to reconsider its order dismissing his show cause motion and to allow the trial to continue. Mr. Phillips asked the Court to conduct a *de novo* review of all the records and issues in Mr. Phillips's Show Cause Motion. At that time the Court could determine, on an individual record by record basis, whether a record is barred by res judicata or collateral estoppel, or if it had been silently withheld or intentionally withheld from disclosure. To lump all of the records in a group and then bar that group under res judicata without reviewing each record individually would potentially deny Mr. Phillips of his right to due process. If all of the records were ruled on previously, Valley Com will have the opportunity to provide evidence to support their claim. Only after Mr. Phillips's claims have been reviewed will substantial justice be done.

The *Phillips II* Court's ruling would cause the following to occur: A citizen requests a document from an agency through public disclosure, but is denied access to the record as the agency claims the record is exempt as it is part of an ongoing investigation. The citizen, not satisfied with that answer, seeks judicial review of the agency's response to his

request. After an in camera review, the court rules that the agency was justified in claiming the record was exempt from disclosure as it is part of an ongoing investigation. Months later, the citizen learns that the investigation is complete and enters a new request for that same record. This time the agency simply refuses to provide the record claiming that the Court has already ruled that the record was exempt from disclosure. The agency does not provide a new reason justifying the withholding, instead claiming that res judicata bars the citizen from seeking judicial review and threatening sanctions against the citizen if he were to seek judicial review of the agency's response to his new request.

Mr. Phillips brought allegations in *Phillips II* that Valley Com violated RCW 42.56.520 when they failed to respond to his August 3, 2008, PRA request within five business days. This separate matter is not barred by res judicata, but that the *Phillips II* court failed to address. The same is true for Mr. Phillips's allegation that Valley Com's failed to respond within the specified timeframe of Mr. Phillips's August 24, 2008, request. These matters are not governed by res judicata or by collateral estoppel. Valley Com's failure to respond within five business days automatically makes Mr. Phillips the prevailing party and that ruling is entirely independent of whether the request in question resulted in Mr. Phillips obtaining the records he sought.

Whether Valley Com met the statutory requirements of RCW 42.56.210(3) is another issue that is not subject to res judicata. Under RCW 42.56.210(3), an agency must provide a statement of the specific exemption and a brief explanation of the reasons for withholding a record (in whole or in part) as part of its response to a request. Failure to provide a statement of the specific exemption and a brief explanation of the reasons for withholding a record (in whole or in part) as part of its response to a request makes it impossible for the requestor to determine if the claimed redaction or exemption is valid. This violates the Act and makes the requestor the “prevailing party” entitled to attorneys’ fees, costs, and penalties. RCW 42.56.210(1); see Citizens for Fair Share v. State Dep’t of Corr., 117 Wn.App. 411, 431, 72 P.3d 206 (2003) (requiring agency to cite statute it claims exempts record from disclosure).

In the *Phillips II* court’s November 2, 2009, *Findings of Fact or Mixed Findings of Fact and Conclusions of Law*, Judge White found:

“The Court issued a final ruling with regard to Mr. Phillips’s public records requests in Cause No. 08-2-04291-0 KNT on May 12, 2008, after reviewing the records withheld or redacted by Valley Com in its responses in camera. Mr. Phillips was notified this was a final order and he did not appeal the Court’s final decision.”

The records Mr. Phillips has sought judicial review for were provided to Mr. Phillips in response to public record requests made *after* the May 12,

2008 ruling entered by Judge Yu. Mr. Phillips has argued that a majority of these records was also responsive to Mr. Phillips 2006 and 2007 PRA requests that the *Phillips I* court reviewed. Valley Com had withheld these records from Mr. Phillips and he only obtained them *after* the *Phillips I* court's May 12, 2008 ruling. Therefore, these records cannot be barred by res judicata. Mr. Phillips cannot be expected to have sought judicial review of records he did not know existed because Valley Com had intentionally withheld the records from disclosure. Therefore, these records cannot be barred by collateral estoppel.

As for the one-year statute of limitations, Valley Com's response letters to Mr. Phillips's requests were each insufficient to constitute a proper claim of exemption and thus did not trigger the one-year statute of limitations under RCW 42.56.550(6). None of Valley Com's response letters (1) adequately describe individually the withheld records by stating the type of record withheld, date, number of pages, and author/recipient, or (2) explain which individual exemption applied to which individual record rather than generally asserting the controversy and deliberative process exemptions as to all withheld documents. Thus, Valley Com has not stated a proper claim of exemption to trigger RCW 42.56.550(6), the one-year statute of limitations on PRA suits, nor will it start until Valley Com provides Mr. Phillips with said privilege logs. Valley Com's

response letters were insufficient to state a claim of exemption under RCW 42.56.210(3), *PAWS II* and WAC 44-14-04004(4)(b)(ii). The state Supreme Court has stressed the need for all local governments to provide a clear exemption log providing the following information: (1) a description of the document that the local government is claiming to be exempt; (2) the date of the document; (3) the author or sender of the document; (4) the recipient(s) of the document; (5) the number of pages claimed as exempt; and (6) the specific exemption relied upon, with an explanation of how the exemption applies to the withheld document. *See RHA v. City of Des Moines*, 165 Wn. 2d. 525 (2009). Accordingly, Mr. Phillips timely filed suit against Valley Com on April 22, 2009.

VI. RULE 11 SANCTIONS SHOULD NOT HAVE BEEN GRANTED AGAINST MR. PHILLIPS FOR FILING HIS MOTION TO SHOW CAUSE AND FOR MOVING THE COURT TO DISQUALIFY VALLEY COMMUNICATION'S COUNSEL.

Washington courts have articulated three distinct duties imposed by CR 11 on the signer of a pleading, motion, or legal memorandum. The signing party or attorney must: (1) conduct a reasonable inquiry into the facts supporting the paper; (2) conduct a reasonable inquiry into the law to ensure that the paper filed is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law; and (3) avoid interposing the paper for any improper purpose, such as delay,

harassment or increasing the costs of litigation. Miller v. Badgley, 51 Wn. App. 285, 300, 753 P.2d 530 (1988). These three duties fit neatly under the two main purposes of CR 11 identified by the Washington Supreme Court in Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 829 P.2d 1099 (1992): The first two duties deter baseless filings, and the third curbs abuses of the judicial system. Blair v. GIM Corp., 88 Wn. App. 475, 482, 945 P.2d 1149 (1997). The 2005 amendments to CR 11 added a fourth duty, the duty to identify specifically any factual denials based on lack of information or belief. purpose, such as delay, harassment or increasing the costs of litigation. Miller, 51 Wn. App. at 300.

A filing is "baseless" if it is (1) not well grounded in fact, or (2) not warranted by existing law or a good faith argument for the alteration of existing law. Bryant, 119 Wn.2d at 220. To pass muster (that is, to be non-frivolous), a filing must meet both the fact and the law standard. *Id.* A pleading, motion, or other memorandum is not well grounded in fact unless a competent attorney would believe his or her actions to be factually justified. *Id.* at 220. A pleading, motion, or other memorandum meets the legal minimum if it is based on a plausible view of existing law or a good faith argument for extension, modification, or reversal of existing law. State ex rel. QuickRuben v. Verharen, 136 Wn.2d 888, 904, 969 P.2d 64 (1998). To impose sanctions, a court must find not only that

the offending filing is baseless, but also that it was signed without a reasonable and competent inquiry into its factual and legal basis. Bryant, 119 Wn.2d at 220.

A finding that a pleading, motion, or legal memorandum lacks legal or factual basis is insufficient; a trial court cannot impose CR 11 sanctions "unless it also finds that the attorney who signed and filed the [pleading, motion, or legal memorandum] failed to conduct a reasonable inquiry into the factual and legal basis of the claim." MacDonald v. Korum Ford, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) (quoting Bryant, 119 Wn.2d at 220). The reasonableness of an attorney's inquiry is evaluated under an objective standard. Bryant, 119 Wn.2d at 220. "The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or legal memorandum was submitted." Id. The trial court should impose sanctions "only when it is patently clear that a claim has absolutely no chance of success." MacDonald, 80 Wn. App. at 884 (citations omitted). The court is required to inform itself and make *explicit* findings as to the inquiry undertaken by the signing party. QuickRuben, 136 Wn.2d at 904 (emphasis added); Blair, 88 Wn. App. at 483. "If an appellate court cannot ascertain what reasons prompted a trial

court's ruling, it is impossible to determine whether the ruling is based on objective standard. Bryant, 119 Wn.2d at 220

In its June 19, 2009 and November 2, 2009 rulings, the Court failed to make explicit findings of fact to warrant the imposition of CR 11 sanctions. Instead discussing, listing, or describing the inquiry undertaken by Mr. Phillips prior to his filing the second Motion to Show Cause, such that an appellate court identify its reasoning, the court repeats the conclusory statement that the claims were not grounded in fact or law. Additionally, the sanctions that the Court imposed on Mr. Phillips pursuant to CR 11 are equally illogical. The numbers appear to be picked at random and applied willy-nilly. For example, the Court awards Valley Com CR 11 sanctions in the amount of \$500 for drafting Valley Com's Reply to Mr. Phillips's Response to Valley Com's Motion for Attorney's Fees and Costs. It is unreasonable to sanction Mr. Phillips for work that Valley Com had to do as a result of a motion that it filed. Such a ruling has no basis in fact or law.

CONCLUSION

For all the above arguments, Mr. Phillips asks this Court to reverse the trial court's rulings on the Dismissal of Mr. Phillips's Motion to Show Cause and Motion for Sanctions. In addition, Mr. Phillips asks the Court

to remand the cause to the Superior Court for findings on Valley Com's
violations of the Public Records Act.

Dated this 23th day of February, 2010

A handwritten signature in black ink, appearing to read 'Tim Schoenrock', written in a cursive style.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury of the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and I am competent to be a witness herein.

That on the 23rd day of February, 2010. I caused to be served to the following: *Appellant's Brief, Court Papers, and Certificate of Service* upon the following individual in the manner indicated below:

Eileen M. Lawrence
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COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2010 FEB 24 PM 4:07



Tim Schaenrock