No. 444984-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST

Appellant,

vs.

DEPARTMENT OF LICENSING

Respondent

APPELLANT ARTHUR WEST'S REPLY BRIEF

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I. INTRODUCTION

The Public Records Act requires that agencies provide the most timely possible assistance to requestors and that its exemptions should be construed strictly and its provisions construed liberally. The Department of Licensing did neither in responding to Mr. Arthur West's public records act. Instead, it sat on documents it identified very early in its search for responsive records, and allowed one exemption – excepting from production information received from the Tribes – to swallow up and "render exempt" non-exempt information that Mr. West sought. This Court should conclude that the Department violated the Public Records Act and should reverse and remand.

II. ARGUMENT

A. Standard of Review

The Department agrees with Mr. West that the standard of review for this Court's review of the Trial Court's grant of summary judgment is de novo. *Cf.* Opening Brief at 18 *and* Response Brief at 12-13.

Mr. West also argued that this Court's review of the Trial Court's denial of Mr. West's motion for reconsideration is de novo, because the Trial Court was making rulings as to the law, rather than deciding questions of fact. Opening Brief at 18-19, *citing* State v. Crowell, 92 Wn.2d 143, 145, 594 P.2d 905 (1979) (holding that the principle that

rulings on motions for reconsideration are reviewed for abuse of discretion is subject to the limitation that when the ruling is as to the law, it is reviewed de novo). The Department overlooked this argument and citation: "Although West claims the Court should review the superior court's denial of his motion for reconsideration de novo, he cites no authority for this assertion. Appellant's Br. at 36." Response Brief at 42.

Mr. West cited the law correctly. The standard of review in this case is de novo, both as to the Trial Court's grant of summary judgment and to its denial of reconsideration.

B. The Department Improperly Withheld and Redacted Amounts of the Fuel Tax Refunds that the Department Made to the Tribes

Mr. West and the Department agree that RCW 42.56.230(4) and RCW 82.36.450(4) exempt from production under Washington's Public Records Act ("PRA") information received **<u>from</u>** Washington's federally-recognized Indian Tribes when the Tribes are requesting fuel tax refunds pursuant to the Department's fuel tax program. Mr. West argues that these statutes *do not* exempt from production the amounts of fuel tax refunds issued by the Department **<u>to</u>** the Tribes, while the Department argues that it properly redacted these amounts because a person could work backwards from the amounts and figure out what information the Tribes provided.

This argument from the Department is founded on the same premise as is Mr. West's: the refund amounts from the Department to the Tribes is *different information* than the refund requests, or the numbers of gallons reported, or the number of tribal members that the Tribes report to the Department, even though certain numerical *figures* (i.e., the refund amounts and the refund requests) may end up being identical. What the Department is arguing is that it must redact and withhold information (the refund amounts **to** the Tribes) that is *not* exempt under the statutes in order to protect information (information received **from** the Tribes) that is exempt. "The Department's redactions were necessary to protect information it received from tribes as required by RCW 82.36.450 and RCW 42.56.230(4)(b)." Response Brief at 17.

Mr. West agrees with the Department that we are talking about information here: information that is exempt (information received from Tribes) and information that is not exempt (amounts of refunds given by the Department to the Tribes). The distinction drawn by the Department is thus inapplicable: "Here, the plain language of the exemption statutes make clear that it is not just a particular *record* that is exempt but the *information* itself that is exempt." Response Brief at 17. Mr. West is not making the facile argument that pieces of paper that have the

Department's letterhead on them are non-exempt, while pieces of paper that have a Tribe's letterhead are exempt.

Instead, Mr. West is focusing on the information at issue; the two classes of information answer different queries. What information did the Tribes provide the Department? Fuel tax refund requests, number of gallons of fuel sold, identities of licensed gas stations on Tribal lands, and numbers of enrolled tribal numbers. This information is exempt. How much money did the Department refund to the individual Tribes on a monthly basis? The answer to this question is the amounts of the fuel tax refunds. This information is not exempt. Imagine a piece of paper written by the Department that stated, "the Tribe requested a fuel tax refund in the amount of $323.48 and the Department issued a fuel tax refund in the amount of $323.48." The first figure of $323.48 would be exempt (since it was information received from the Tribe) and the Department should not produce this imaginary record without redacting it, but the second figure of $323.48 is subject to no exemptions and should not be redacted.

That two separate classes of *information* (exempt information, the information received by the Department **from** the Tribes, and non-exempt information, the fuel tax refund amounts issued by the Department **to** the Tribes) are at issue here make this case squarely on point with Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 298, 259 P.2d 190

(2011). There, too, while one class of information was found to be exempt from disclosure and could properly be redacted (Officer Cain's name and identity), the other class of information – the remainder of the reports – were *not* exempt from disclosure, even though production of the remainder of the reports would probably result in third persons figuring out Officer Cain's name and identity. Bainbridge Island, 172 Wn.2d at 417-418.

Just because a third person could look at the reports with Officer Cain's name redacted, and compare them to the request (which sought the reports on Officer Cain, naming him) and figure out that the reports concerned Officer Cain, that did not render the non-exempt information (the remainder of the information in the reports) exempt. And here, just because a third person could look at the fuel tax refund amounts and figure out some of the information that the Tribes provided to the Department, that does not render the fuel tax refund amounts *exempt information*. Under the holding in Bainbridge Island, the Trial Court erred in concluding that the fuel tax refund amounts **to** the Tribes were exempt information under the statute that exempted information received **from** the Tribes.

The Department implies that the precedent in Bainbridge Island is somehow weakened because the opinion issued from "an equally divided

court." Response Brief at 18. Yet consider the division: one justice, Justice Fairhurst issued the lead opinion, in which three justices concurred. Bainbridge Island, 172 Wn.2d at 424. Chief Justice Madsen issued an opinion concurring in part and dissenting in part, in which three more justices concurred. Bainbridge Island, 172 Wn.2d at 424. Chief Justice Madsen's concurrence/dissent agreed with the lead opinion that the two reports were non-exempt and should be produced, dissenting only in that Officer Cain's identity was not exempt and should not be redacted. Only Justice M. Johnson dissented, finding that the reports were investigative records within the investigative record exemption and should not be produced at all. 172 Wn.2d at 431.

That Justice Fairhurst's opinion was the lead opinion indicates that the justices who dissented on the basis that Officer Cain's identity was not exempt and should not be redacted would similarly hold that non-exempt information cannot be rendered "exempt" simply on the basis that the disclosure of the non-exempt information might result in some third person being able to figure out other, exempt information.

If there is any doubt, after Bainbridge Island, whether non-exempt information is rendered exempt simply because its production may result in a third person being able to figure out "exempt" information, this Court should apply the PRA's statutory construction principles (*e.g.*, "To fulfill

the statutory purpose, courts are to liberally construe the Act's disclosure provisions and narrowly construe its exemptions," Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1, 138 Wn.2d 950, 957, 983 P.2d 635 (1999); "Because the act favors disclosure, the statutory exemptions must be construed narrowly," Dawson v. Daly, 120 Wn.2d 782, 789, 845 P.2d 995 (1993) (overruled on other grounds as recognized in Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 755, 174 P.3d 60 (2007); "Statutory exemptions are narrowly construed because the [PRA] requires disclosure," Newman v. King County, 133 Wn.3d 565, 571, 947 P.2d 712 (1997); and "We are to construe [the PRA's] provisions liberally to promote complete disclosure of public records," Kleven v. City of Des Moines, 111 Wn. App. 284 , 289, 44 P.3d 887 (2002)).

Applying the PRA's statutory construction principles, this Court should conclude that allowing a limited exemption (information provided by Tribes) to swallow up non-exempt information (refund amounts issued by the Department) would do violence to the PRA's pro-disclosure policies. "[The PRA] shall be liberally construed and its exemptions narrowly construed to promote this public policy [that "the people insist on remaining informed so that they may maintain control over the instruments that they have created."] RCW 42.56.030.

The Department again argues that Bainbridge Island can be distinguished because there, the courts were called upon to analyze whether production of personal information violates the right to privacy, whereas here, RCW 82.36.450(4) already deems tribal information to be private and that the release thereof would violate the right to privacy. Response Brief at 20. But this is no basis to distinguish Bainbridge Island, because the analysis of whether the remainder of the non-exempt reports were rendered exempt simply because a third person could work out Officer Cain's identity is premised on a finding that the production of personal information – Officer Cain's identity – would indeed violate the right to privacy. The analysis here starts at the same place: production of the information from the Tribes to the Department would violate the right of privacy.

The Department argues that in Bainbridge Island, the Court found that the public had a legitimate interest in learning how allegations of police misconduct are investigated. Here, Mr. West, as a member of the public, has a legitimate interest, recognized in statute, in learning how the Department manages funds and the amounts of the fuel tax refunds that the Department makes to the Tribes. RCW 40.14.010 defines "official public records" as "all original vouchers, receipts, and other documents necessary to isolate and prove the validity of every transaction relating to

the receipt, use, and disposition of all public property and public income from all sources whatsoever."

C. Mr. West's Lawsuit Was Necessary to Compel the Department to Produce the Records He Requested

Under the PRA, a requesting party may file an action when it believes that a government agency has not complied with the act. RCW 42.56.550. The Department agrees with Mr. West that a PRA lawsuit may be necessary when an agency, by resisting disclosure of requested records, forces a requester to file an action. Response Brief at 21, citing Spokane Research and Def. Fund v. City of Spokane, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005). Here, at the time Mr. West filed his lawsuit, he knew that the Department was resisting disclosure of records showing the total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present.

The Department, from the beginning, had claimed that all records responsive to the first part of his request, "(1) All records showing the total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present" (CP 89), were exempt. Ms. Fultz had written to Mr. West saying, "Records responsive to items #1 and #2 are exempt from disclosure." As argued above, the Department's position here is not in accordance with law. The fuel tax refund amounts of money refunded

from the Department to the Tribes is not exempt under RCW 82.36.450(4), which only exempts information provided to the Department from the Tribes. Mr. West reasonably believed, therefore, that the Department was not complying with the Act.

Further, Mr. West had another basis for believing that the Department was not complying with the Act. The Department had informed him that there existed records responsive to his request, but had failed to disclose them. "Please note that pages #000001 to 000020 aren't listed on the log. The Department is currently working with our attorneys to determine whether or not these pages are exempt, either in whole or in part. Pending their review, and adding in a short time to appropriately document this outcome for you, I expect to report the outcome to you by March 16, 2012." CP 129. The Department did not describe the records to Mr. West or inform him of what applicable exemption might apply or provide a brief explanation of the withholding. RCW 42.56.210(3).

By failing to describe the records in an exemption log, the Department failed to disclose the records to Mr. West.

1. Records are either "disclosed" or "not disclosed." A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.

2. Disclosed records are either "produced" (made available for inspection and copying) or "withheld" (not

> produced). A document may be lawfully withheld if it is "exempt" under one of the PRA's enumerated exemptions. A document not covered by one of the exemptions is, by contrast, "nonexempt." Withholding a nonexempt document is "wrongful withholding" and violates the PRA. Yousoufian v. Office of King County Executive, 152 Wn.2d 421, 429, 98 P.3d 463 (2004) (Yousoufian II).
>
> 3. A document is never exempt from disclosure; it can be exempt only from production. An agency withholding a document must claim a "specific exemption," i.e., which exemption covers the document. RCW 42.56.210(3). 2 The claimed exemption is "invalid" if it does not in fact cover the document.

Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). Not only should an exemption log contain a claimed exemption, but it should also sufficiently describe the document so that it can be identified. "The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content." Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 271 n. 18, 884 P.2d 592 (1994) (PAWS II). Failure to produce an exemption and redaction log is a violation of the public records act. RCW 42.56.210(3); Citizens for Fare Share v. Dep't of Corrections, 117 Wn. App. 411, 431, 72 P.3d 206 (2003). Indeed, an improper or inadequate exemption and redaction log is no response at all. Rental Housing Ass'n

of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 535-41, 199 P.3d 393 (2009) (inadequate exemption log insufficient to trigger running of one-year statute of limitations).

More than four months later, after the Department had missed its self-appointed deadlines for disclosure of these twenty pages, the Department finally disclosed these twenty pages in an exemption log. The exemption the Department ended up claiming was the same one that it had claimed in its first exemption log. *Cf.* CP 1244 and CP 133-138. The Department – even if its attorneys had not yet finished determining whether the pages were exempt – had already located the pages and knew what any likely exemptions might be. It owed a statutory duty to provide the most timely possible assistance to Mr. West and to either produce the records or disclose them to him in an exemption log. RCW 42.56.520. It would not have been hard for the Department to describe these pages that it had already found in an exemption log and disclose the likely exemption, even while the attorneys were still reviewing the twenty pages. Had the attorneys later determined that the pages were non-exempt, or that a different exemption applied, the Department could have produced the records to Mr. West or amended the exemption log, as it is permitted to do under the Act. PAWS II, 125 Wn.2d at 253.

The Department argues that "in instances where an agency provides the requester with a time frame for providing the requested records, the agency should be allotted that amount of time to perform and provide those records before a lawsuit becomes necessary to compel production." Response Brief at 21, *citing* Linstrom v. Ladenberg, 98 Wn. App. 612, 617, 989 P.2d 1257 (1999). This argument fails for two reasons. First, the Department had already informed Mr. West that all records responsive to part 1 of his request were exempt. Mr. West knew that the statutory exemption claimed did not apply to his requested records, so he knew that the Department was violating the Act. Second, Mr. West did allot the Department the time it estimated for providing the balance of the requested records, but the Department ignored its own self-imposed deadlines of March 16 (CP 129), March 23 (CP 129), and June 11 (CP 140).

The case of Soter, 162 Wn.2d at 750, is instructive. There, the Court held "For practical purposes, the law treats a failure to properly respond as a denial. *See* RCW 42.56.550(2), (4) (formerly RCW 42.17.340) (allowing requester to challenge agency estimate of time it will take to respond and allowing imposition of daily fine for each day requester was denied access to record)." The Department argues that "the Supreme Court is clearly referring to an agency's failure to respond to a

request within five business days, as required by RCW 42.56.520, by providing the records, denying the request, or providing a reasonable estimate of the time the agency will take to respond." Response at 22, n. 12. Actually, it appears that the Supreme Court – in providing an example to another statute, RCW 42.56.550(2) – meant that *any* failure to respond properly is treated as a denial, not merely the failures enumerated by RCW 42.56.520, as the Department argues.

Here, the Department, in addition to wrongly claiming the exemption for the fuel tax refund amounts issued by the Department, also violated the Act by failing to describe the records and cite an applicable exemption for the initial twenty pages the Department had told Mr. West about but failed to disclose, and failing to provide a brief explanation of the withholding. RCW 42.56.210(3). The Department did not comply with this portion of the Act for four months, ignoring each of its self-imposed deadlines and failing to inform Mr. West that it needed more time or to provide any kind of an explanation for the time it was taking.

The Department argues that its descriptions of the searches it was conducting while failing to communicate with Mr. West demonstrate that it had not abandoned its response, as Mr. West thought. Response at 26. But it failed to communicate with Mr. West during that time, either to

inform him of the progress of its searches or to explain that it needed to increase its estimates of the time it would take to respond to Mr. West.

D. The Department's Response Was Untimely

There are three grounds on which this Court should conclude that the Department's response to Mr. West was untimely. First, the Department repeatedly ignored its own estimates of the time it would take to respond to Mr. West. "An agency should either fulfill the request within the estimate time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate. An agency should not ignore a request and then continuously send extended estimates." WAC 44-14-04003(6). Here, the Department failed to communicate with Mr. West about the need for a revised estimate, and it even initially failed to send "extended estimates." It was only as Mr. West conducted discovery that the Department began communicating "extended estimates" to Mr. West.

In his opening brief, Mr. West cited to Violante v. King County Fire District No. 20, 114 Wn. App. 565, 570-71, 59 P.3d 109 (2002), arguing that an agency's ignoring its own deadline and failing to produce records within that deadline is a violation of the Public Records Act. The Department argues that Violante does not stand for this proposition. Yet the Washington State Bar Ass'n Public Records Act Deskbook (persuasive

authority here, and authority upon which the Department itself relies (*see* Response Brief at 33) here states:

> Once case addresses the remedy when an agency gives an estimate of time to provide the records but fails to do so. In Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 59 P.3d 109 (2002), an agency (after several ignored requests) gave a 14-day estimate for production. After the estimate lapsed by several days, the requestor filed suit under RCW 42.17.340(1)/**RCW 42.56.550(1)**. The court held that the agency violated the PRA and that the requestor was the prevailing party. Violante, 114 Wn. App. at 570; *see also* WAC 44-14-04003(6).

Washington State Bar Ass'n, Public Records Act Deskbook, §16.1(2)(b) at 16-4 (2006 Ed. and 2010 Supp.). WAC 44-14-04003(6) provides in part, "An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records." Here, the Department's serial extensions that it ignored had the effect of denying Mr. West his access to public records.

Another ground for this Court finding that the Department did not timely respond to Mr. West concern groups of records that the Department had at its fingertips early on but did not produce to Mr. West until much later. The first group of records is, of course, the twenty pages that the Department had found and identified, but had failed to disclose. The Department communicated the existence of the records but failed to identify them in a proper exemption log until four months had passed and

the Department had ignored its promised deadlines. As argued above, when the Department finally did produce an exemption log disclosing these twenty pages, it claimed the same exemption that it had already claimed for other records.

This Court should hold that the Department could have easily disclosed these records to Mr. West by properly identifying them in a log and making a claimed exemption, along with a brief description of how the exemption applied, even while the Department's attorneys were still reviewing these twenty pages. The Department is required by statute to provide the timeliest possible assistance to Mr. West and to respond to him promptly. RCW 42.56.100; RCW 42.56.520. In the event that the Department's attorneys determined the pages were non-exempt or that a different exemption applied, the Department could simply have produced the records or, as appropriate, amended the exemption log. PAWS II, 125 Wn.2d at 253.

Similarly, the Department had at its fingertips the September 15, 2011 public records response that it made to KOMO's Tracy Vedder (excerpts at CP 1719; 1721-1728; and 1730-1785) before Mr. West even made his request. The Department also had at its fingertips the "Refund amount spreadsheets" as early as February 17, ready to give to Mr. West. CP 114. But the Department did not produce these records to Mr. West

until after the summary judgment hearing on December 27. CP 1581-1588; CP 1590-1623.

Mr. West is not arguing that the Department was supposed respond instantly or to produce records in any particular order simply because Mr. West wanted them to, but he is arguing that when an agency has groups of records easily on hand, and it is required by the Act to provide the timeliest possible assistance to requestors, that the agency does have a duty to produce quickly those records that it *can* produce quickly, while the agency continues to work on the remainder of the request. *See, e.g.*, RCW 42.56.100; *see also* WAC 44-14-0403(1) ("....A relatively simple request need not wait for a long period of time while a much larger request is being fulfilled....").

The Department also argues that "West never requested that the Department give certain records priority over others." Response at 41-42. This is not true. Mr. West communicated early on, saying:

> ...as far as the total amounts of money paid to the tribes are concerned, this information is not voluminous and should be available immediately, especially since it is probably kept in a computer file to begin with. Please realize that this request has been pending since January 12, and for simple records like a one or two page accounting of funds paid to the tribes, the additional period of time is unreasonable, especially in light of the long time consumed in the department's response and "clarification" process.

CP 97. Instead of producing to Mr. West that which he most wanted and which he had prioritized – that which the Department had found very early on (as is shown in the February 17 email, CP 114) – the Department sat on them and worked instead to search for and assemble thousands of pages of non-responsive records (records that solely showed information received from the Tribes, rather than records that showed the amounts of fuel tax refunds issued by the tribes), as well as other, responsive records.

With respect to Mr. West's second request, for indexes of public records encompassing the gas tax refund amounts (and for document retention schedules), the Department argues that the check registers it disclosed on December 27 are not indexes, referring back to the definition it provided to Mr. West in the communication informing Mr. West that it had no indexes. CP 165. This argument does not apply here. In the email in question, Ms. Fultz told Mr. West that there simply were no responsive indexes, explaining that the Fuel Tax Refund System used system-generated indexes. She asked Mr. West to inform her if he had meant something different by "index." Since she had told him that there were no responsive indexes, there was no need for any reply. Based on Ms. Fultz's email, Mr. West could not have known that there existed such a register, which itself is a list of checks sent to the various tribes, that is, an "index" of records that encompass the fuel tax refund amounts.

The Department also argues "Neither the statute [RCW 42.56.070] nor the rules [WAC 308-10-065 and 308-10-067] require the Department maintain an index of gas tax refund amounts." Response at 39, n. 20. The Department here is incorrect. Mr. West did not request an index of gas tax refund amounts, but an index of *public records that encompass* the fuel tax refund amounts. CP 97 (emphasis added). And WAC 308-10-067(2) does require on its face that the Department maintain such an index: "The department shall maintain a general index of all its records available to this public for inspection and copying, including those records mentioned above."

E. The Trial Court Erred in Denying the Motion for Reconsideration

The Department overlooks Mr. West's argument on the correct standard of review for the denial of a motion for reconsideration where the only issues decided are questions of law, not questions of fact. *See* Opening Brief at 18-19, citing State v. Cowell, 92 Wn.2d 143; *cf.* Response Brief at 42. Here, the standard of review is de novo.

A motion for reconsideration based on newly discovered evidence can only be granted if the evidence is such that it will probably change the result of the trial, was discovered since the trial, could not have been discovered before trial by the exercise of due diligence, is material, and is

not merely cumulative or impeaching. Go2Net Inc. v. C.I. Host, Inc., 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). Here, the newly discovered records were material to the issues that were before the Trial Court on summary judgment, which included whether the Department had violated the Public Records Act in failing to timely provide responsive records to Mr. West. As argued above, the Department had at its fingertips from the very beginning responsive records that it withheld from Mr. West until the last production. Had the Trial Court considered these records, it would have concluded that the Department could have produced them to Mr. West much earlier even as it continued searching for other records.

F. Request for Fees

Mr. West repeats the request for fees he made in his opening brief.

III. CONCLUSION

This is a simple case focused on the propriety of the exemption claimed and whether it applies to render non-exempt information exempt, in order to prevent third persons from "solving for X" and figuring out the exempt information. The law here is clear: exemptions are strictly construed, the PRA's provisions are liberally construed, and the Act does not allow an exemption to apply to prevent production of non-exempt information. For the foregoing reasons, this Court should reverse and remand.

Respectfully submitted this 31st day of October, 2013.

/s/ Stephanie M. R. Bird

Stephanie M. R. Bird, WSBA #36859

CERTIFICATE OF SERVICE

On this 31st day of October, 2013, the undersigned caused the foregoing document to be filed with the Court of Appeals, Division II, and served in the manner indicated on the following parties:

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

SIGNED at Seattle, Washington this 31st day of October, 2013.

/s/ Stephanie M. R. Bird

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