90943-1

IN THE SUPREME COURT OF WASHINGTON

JOHN ANDREWS
Petitioner

v.

WASHINGTON STATE PATROL
Respondent

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION III

The Honorable Robert E. Lawrence-Berrey, Kevin M. Korsmo, and Laurel Siddoway, Judges

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PETITION FOR REVIEW

JOHN ANDREWS, WSBA No. 21387
BISHOP, CUNNINGHAM & ANDREWS, INC., (P.S.)
Attorneys at Law
3330 Kitsap Way
Box 5060, West Hills Station
Bremerton, WA 98312
TELEPHONE (360) 377-7691
FACSIMILE (360) 377-5484

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I. IDENTITY OF PETITIONER

Petitioner John Andrews asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Mr. Andrews seeks review of Division Three's decision in Andrews v. Washington State Patrol, No. 32288-2-III (September 16, 2014). A copy of the decision is in Appendix A of this petition.

III. INTRODUCTION & ISSUES PRESENTED FOR REVIEW

In response to Mr. Andrews' Public Records Act (PRA) request to Washington State Patrol (WSP), WSP responded with three consecutive estimates of response time. There were a total of eleven (11) days between these self-imposed deadlines where WSP failed to respond entirely, including failing to return Mr. Andrews' messages regarding his PRA request.

In affirming the trial court's grant of WSP's motion for summary judgment, Division Three ruled that a flexible approach that focuses on the thoroughness and diligence of the agency's response is consistent with the PRA.

Issue: Where numerous Washington state Court of Appeals and Supreme Court cases apply a strict, rather than flexible, approach in PRA cases, should this Court grant review to resolve this conflict? RAP 13.4(b)(1) & (2).

IV. STATEMENT OF THE CASE

On March 8, 2012, John Andrews submitted a written Public Records Act (PRA) request to Washington State Patrol (WSP). RP 3. On March 15, 2012, Mr. Andrews received a letter via e-mail from Gretchen Dolan with the Risk Management Division of the WSP. *Id.* Ms. Dolan estimated 20 days to produce the requested documents. *Id.* The documents would have been due on April 4, 2012. *Id.* WSP did not produce the documents by this date. *Id.*

Mr. Andrews did not hear from WSP until April 11, 2012. RP 3. Ms. Dolan estimated that an additional 20 days was required to respond. *Id.* The records would have been due on May 1, 2012. *Id.* WSP did not provide the records by May 1, 2012 either. *Id.* There was no further communication from Ms. Dolan or anyone at WSP. *Id.*

Mr. Andrews made several attempts to contact Ms. Dolan to inquire about the delay. RP 3. Ms. Dolan did not return any of the messages. *Id.* Mr. Andrews thus filed suit for WSP's violation of the PRA. *Id.*

Even after filing suit, WSP did not promptly produce the records. RP 4. Instead, it requested another 20-day extension. *Id.* WSP finally mailed responsive documents to Mr. Andrews on May 25, 2012, only after suit was filed. *Id.*

On February 8, 2013, the trial court granted WSP's motion for summary judgment, and dismissed Mr. Andrews' PRA action with prejudice.

RP 6. Mr. Andrews' appeal followed. Division Three affirmed the trial court's ruling. Appendix A.

Division Three applied "a flexible approach that focuses upon the thoroughness and diligence of an agency's response." Appendix A at 2. The court recognized that WSP's response was late, but declined to find a violation of the PRA because WSP diligently searched for and eventually provided responsive records. *Id.* at 1-2.

Mr. Andrews seeks review of the Division Three ruling from this Court. Specifically, he seeks review of the court's holding that a flexible rule applies in the determination of whether an agency has violated the PRA when its response is late.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The PRA "is a strongly worded mandate for broad disclosure of public records." *Progressive Animal Welfare Soc. v. University of Wash. (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (internal quotation makes omitted). It requires government agencies to disclose records upon request, unless an exemption applies. *See* RCW 42.56.520. The disclosure requirements of the PRA are broadly construed, and the exemption requirements are narrowly construed. *Id.* at 251.

In response to a PRA request, agencies must provide "the fullest assistance to inquirers and the most timely possible action on requests for

information." RCW 42.56.100. Under RCW 42.56.520, within five business days of receiving a PRA request, the agency must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested; (3) acknowledging that the agency has received the request and providing a reasonable estimate of the time the agency will require to respond to the request; or (4) denying the public record request. *Id.*

Washington state Supreme Court and Court of Appeals cases consistently apply a strict, inflexible, reading to the PRA. When an agency has failed to comply with the PRA, the courts have not excused the noncompliance by the agency's good faith efforts or other mitigating factors.

A. Washington state Supreme Court cases have upheld a strict approach to the PRA, finding that an agency violated the PRA despite the existence of mitigating factors.

The Court has found a PRA violation even though the agency attempted to comply or partially complied with the PRA provision. In *Sanders v. State*, the Court held that the State violated the PRA's requirement to provide a "brief explanation" of how the exemption applies to withheld records. 169 Wn.2d 827, 240 P.3d 120 (2010). In this case, the State withheld records, and "explained" the claimed exemptions by identifying each withheld document's author, recipient, date of creation, and broad subject matter along with its specification of the exemption. *Id.* at 845. The Court

held that the State's explanation was not sufficient under the PRA: "Allowing the mere identification of a document and the claimed exemption to count as a 'brief explanation' would render the brief-explanation clause superfluous." *Id.* at 846.

The Court has strictly enforced the remedial provisions of the PRA following an agency's violation, despite an apparent lack of necessity of the PRA lawsuit. In *Neighborhood Alliance of Spokane County v. County of Spokane*, the county's failure to provide all responsive records in violation of the PRA was not cured by the requester having possession of the responsive records prior to filing suit. 172 Wn.2d 702, 261 P.3d 119 (2011). The Court held that, under the PRA provision allowing costs and penalties to the "prevailing party" in a PRA lawsuit, the lawsuit did not have to cause the disclosure of the records in order for the requester to be the prevailing party. *Id.* at 726.

Lastly, the Court has enforced disclosure of portions of records that would otherwise be exempted from disclosure. In *Bainbridge Island Police Guild v. City of Puyallup*, the Court held that it was contrary to the PRA to entirely withhold a record that contained both exempt and nonexempt information; rather the record should have been disclosed but redacted. 172 Wn.2d 398; 416, 259 P.3d 190 (2011).

B. Other Washington State Court of Appeals cases have strictly interpreted various provisions of the PRA, and thus found responding agencies in violation.

Division Two has taken a very literal reading of the PRA's requirement to provide a statement of exempt records, and found the agency in violation despite the fact that the agency had not yet provided records. In *Mitchell v. Washington State Dept. of Corrections*, in response to the inmate's request to transmit records via e-mail, the Department explained that the records would have redactions of exempt material and therefore could not be sent electronically. 164 Wn. App. 597, 601, 277 P.3 670 (2011). The court held that this communication violated the PRA because the Department refused the inmate access to part of the records without reciting the statutory provisions under which it claimed such an exemption. *Id.* at 603. Although the Department had not provided records with the communication in question, the court applied a very strict reading of the PRA requirement that "an exemption statement must be included in any response 'refusing in whole or in part inspection of any public record,'" which requirement was not explicitly conditioned on the agency providing records. *Id.* at 604.

Similarly, the court of appeals applied a strict approach to the PRA's requirement to respond within five business days and provide an explanation for exempt records, despite the fact that the agency promptly provided records and eventually provided explanations. In *Gronquist v. Washington State*

Dept. of Licensing, although the Department provided responsive records 11 days after the request was made, the court found that the Department violated the PRA because it first responded to the request 8 days after receiving the request. 175 Wn. App. 729, 746, 309 P.3d 538 (2013). The court also found that the Department violated the PRA when it failed to initially provide an explanation of redactions, although the explanations were provided later.

VI. CONCLUSION

In this case, the court's application of a flexible approach to the PRA is inconsistent with other Washington State Supreme Court and Court of Appeals cases, which have applied a strict or literal reading. A strict application in this case would have yielded a finding that the WSP violated the PRA with its late response, and minimal penalties for 11 days would have been appropriate. The fact that WSP mitigated the situation by diligently searching for records does not cure the violation, but rather reduces the amount of the daily penalties. For the foregoing reasons, Mr. Andrews requests that this Court accept review of the Court of Appeals decision below, find that WSP has violated the PRA with its delayed responses, award penalties for 11 days, and award reasonable attorney's fees and costs.

DATED this 17 day of October, 2014.

John C. Andrews, WSBA#21387
BISHOP, CUNNINGHAM & ANDREWS, INC. (P.S.)
3330 Kitsap Way
Bremerton, WA 98312
Telephone: (360) 377-7691
Fax: (360) 377-5484
Email: jandrews@bcalawyers.com

APPENDIX A

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

JOHN ANDREWS, Appellant, v. WASHINGTON STATE PATROL, Respondent.	)	No. 32288-2-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — RCW 42.56.100 requires that an agency responding to public records requests provide "the fullest assistance to inquirers and the most timely possible action on requests for information." Some agencies are beleaguered with several hundred or even thousands of public records requests in a short period of time. When an agency, despite acting diligently, fails to comply with its self-imposed deadlines, a question arises: Should courts apply rigid rules that penalize a diligent but late response, or may courts take a flexible approach?

We determine that a flexible approach that focuses upon the thoroughness and diligence of an agency's response is most consistent with the concept of "fullest assistance." We, therefore, affirm the trial court's summary judgment order in favor of the Washington State Patrol (WSP).

FACTS

After discovering that some attorney-client telephone conversations were being recorded in a WSP breath alcohol concentration room, John Andrews submitted a public records request on March 8, 2012, seeking the following:

> All of the following requests are limited to WSP District One office from January 1, 2009 involving [driving under the influence] suspect/defendant
>
> 1. Policies or procedures regarding recording attorney-client telephone conversations
> 2. Copy of all recorded attorney-client telephone conversations
> 3. Copies of any documents authorizing the WSP to record attorney-client phone calls
> 4. Copies of phone records of all lines on which attorney-client telephone conversations have been recorded

Clerk's Papers (CP) at 6.

On March 15, 2012, the WSP sent Mr. Andrews an initial response letter that acknowledged the request and estimated about 20 days to produce responsive records. On April 11, 2012, the WSP's public records officer, Gretchen Dolan, sent Mr. Andrews an e-mail that extended the estimated response period for another 20 days. In her

message, she explained that "[a]dditional time is required to research this request, notify involved parties, and/or prepare records for dissemination." CP at 8. Mr. Andrews left messages with Ms. Dolan about the delay. Ms. Dolan did not return his telephone calls. Ms. Dolan did not send another extension letter on May 1, 2012. This oversight was due to the volume of pending public records requests. Between January 1, 2012, and March 8, 2012, the WSP had received approximately 2,307 public records requests and subpoenas duces tecum and, since March 15, 2012, it had received an additional 1,882 such requests.

On May 3, 2012, Mr. Andrews filed a lawsuit against the WSP for violation of the Public Records Act (PRA), chapter 42.56 RCW, alleging the WSP had "failed to produce records after its own time estimates" and had not "provided a reasonable estimate of time to produce the records [or] provided the fullest assistance." CP at 4. The WSP responded on May 9, 2012, and estimated it could produce the records by May 31, 2012. It explained that due in part to the sensitivity of the potentially confidential records, the search was more complex than initially contemplated.

The WSP later detailed the complexity of the search, noting that Ms. Dolan gathered the language line billing records from October 2011[1] to March 2012, computer aided dispatch (CAD) records from October 2011 to March 2012, the police officers' incident reports from the time and dates listed in the language line billing records, and the digital recordings. Ms. Dolan then reviewed the incident reports that corresponded to the digital recordings to determine whether the officer noted that the suspect was connected with an attorney. To preserve the confidentiality of the attorney-client conversation, WSP personnel were instructed not to listen to these recordings as they searched for records. Based on this review, Ms. Dolan learned the language line, which provides an interpreter to translate implied consent warnings or other information to a person suspected of driving under the influence, had been called 39 times for about 30 arrests.[2] Ms. Dolan then located four incident reports that referenced calls to an attorney.

As of May 8, 2012, Ms. Dolan was still waiting for information regarding whether other language line calls involved communications between a suspect and an attorney. The WSP explained that it was waiting for two recordings from District 1's dispatch, two

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[1] WSP, per internal procedures, does not keep records indefinitely. Mr. Andrews does not contest WSP's inability to produce records prior to October 2011.

[2] The WSP explained that officers may need to call the language line multiple times for a single arrest because the officer may become disconnected from the call and need to redial the language line to contact the interpreter.

recordings from the District 1's direct line to the language line, and five incident reports to review for references of connecting the suspect to an attorney. The WSP also noted that with respect to Mr. Andrews's request for policies and procedures for recording attorney-client telephone conversations, Ms. Dolan had researched the WSP regulation manual and asked personnel in the Field Operations Bureau and the Communications Division whether they had responsive records. On May 25, 2012, the WSP provided a complete response to the request for records, together with a detailed redaction log.

On December 19, 2012, the WSP moved for summary judgment dismissal of Mr. Andrews's lawsuit, arguing that the PRA lacks any provision that expressly requires an agency to produce public records by the agency's estimated response date. In its memorandum in support of summary judgment, it also pointed out that the WSP's meticulous search to identify responsive records justified extending the deadline and that, ultimately, it took less than 90 days to disclose the responsive documents. The WSP stated that seven WSP personnel assisted with locating the language line billings, preserving the recordings, locating the incident reports, and determining which recordings may have contained conversations between attorneys and suspects. These employees included the District 1 public records coordinator, the communications manager, communications supervisors, office staff, and Ms. Dolan.

Mr. Andrews filed a cross motion for summary judgment, contending the WSP "violated the Public Records Act by unreasonably requesting three 20-day extensions for a limited records request, ignoring two of its own deadlines, and failing to timely produce requested records." CP at 103. He maintained that the WSP should have been bound by its time estimates, given the limited request for documents. Notably—both below and on appeal—neither party argued that genuine issues of material fact preclude granting summary judgment.

The trial court granted the WSP's motion for summary judgment and dismissed Mr. Andrews's lawsuit. It framed the issue as "whether or not the production of the documents were in a time that [was] reasonable and that the time estimates were reasonable." Report of Proceedings (RP) at 5. The court found the WSP's time estimates reasonable, given that the request had "four parts, and it specifically was requesting information that affected a third party's privacy rights." RP at 5. The court also noted that the WSP had to develop a meticulous protocol to obtain the records without listening to the telephone calls, which potentially contained private communications between an attorney and a suspect. The court also found that the WSP was dealing with over 1,000 requests during this time period.

Mr. Andrews appeals the summary judgment dismissal of his lawsuit.

ANALYSIS

Mr. Andrews contends the trial court erred in granting summary judgment in favor of the WSP because the uncontested facts show that the WSP violated the PRA's "fullest assistance requirement when it failed to provide documents or otherwise respond with an extension by its established deadlines, and altogether refused to communicate with the requester." Appellant's Reply Br. at 3. Thus, according to Mr. Andrews, the WSP should be subject to statutory penalties for each day that he was denied the right to inspect or copy the records. The WSP responds that an agency is not bound by its estimated response dates, arguing that the PRA does not provide a cause of action for an agency's "inadvertent oversight in neglecting to send out another extension letter or responding to phone calls." Br. of Resp't at 15.

Standard of Review. Judicial review of an agency's compliance under the PRA is de novo. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (citing RCW 42.56.550(3)). We also review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We construe the facts and reasonable inferences in favor of the nonmoving party. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119

(2005). Summary judgment is appropriate if reasonable persons could reach only one conclusion from the evidence presented. *Id.* In an action to enforce the PRA, the burden of proof is on the agency to show that the agency's estimated response time was reasonable. RCW 42.56.550(2).

PRA Compliance. "The [PRA] is a strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PRA requires every government agency to disclose any public record upon request, unless an enumerated exemption applies. *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010); RCW 42.56.070(1). The act requires agencies to provide the "fullest assistance" and the "most timely possible action on requests for information." RCW 42.56.100. The government agency receiving a request for public records must respond within five business days by (1) providing the records, (2) denying the request, or (3) providing a reasonable estimate of the time within which to respond to the request. RCW 42.56.520.

The PRA provides a cause of action for two types of violations: (1) when an agency wrongfully denies an opportunity to inspect or copy a public record, or (2) when an agency has not made a reasonable estimate of the time required to respond to the request. RCW 42.56.550(1), (2). If the requester prevails regarding one of these

violations, the PRA provides an award of "all costs, including reasonable attorney fees." RCW 42.56.550(4). It also gives courts the discretion to "award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." RCW 42.56.550(4).

The PRA contains no provision requiring an agency to strictly comply with its estimated production dates. In fact, the statute gives an agency additional time to respond to a request based upon the need to "locate and assemble the information requested." RCW 42.56.520. "Extended estimates are appropriate when the circumstances have changed." WAC 44-14-04003(6).

In *Ockerman v. King County Department of Developmental and Environmental Services*, 102 Wn. App. 212, 6 P.3d 1214 (2000), Division One of this court considered whether an agency must explain its estimated disclosure date. The court concluded that since the PRA lacked any provision requiring an agency to explain its estimate, the PRA did not impose such a requirement:

> Had the legislature intended that an explanation of the reasonable time estimate be included in the response, it could have said so. We note that the statute expressly requires an agency to provide a written statement of its specific reasons if it denies a record request. Reading these two provisions together, it is clear that the express requirement for an explanation [when an agency denies a request] and the absence of such a requirement [when an agency estimates the disclosure date] was a conscious decision by the legislature.

Id. at 217.

Similarly here, the legislature did not include a provision requiring an agency to disclose records within its initial estimated response date. Moreover, RCW 42.56.520 does not limit the number of extensions an agency may require to respond to a request. The statute simply requires an agency to provide a "reasonable" estimate, not a precise or exact estimate, recognizing that agencies may need more time than initially anticipated to locate the requested records. RCW 42.56.520.

Nevertheless, citing *Violante v. King County Fire District No. 20*, 114 Wn. App. 565, 59 P.3d 109 (2002), Mr. Andrews argues that the WSP bound itself when it initially estimated it could produce the documents by April 4, 2012, and May 1, 2012. He argues, "[b]ecause WSP should have responded to [him] by its set deadlines (even if the response was to estimate an extension), its penalties should be assessed at the number of days between the deadline and WSP's next time estimate." Br. of Appellant at 8-9. Thus, according to Mr. Andrews, he is entitled to penalties for 11 days, which encompass April 4 to April 11, and May 1 to May 5.

As just noted, however, RCW 42.56.520 plainly grants additional time to respond when needed to locate the requested information. In *Violante*, moreover, the only issue was "whether the [requester's] lawsuit was a step reasonably regarded as necessary to

obtain the requested information." *Violante*, 114 Wn. App. at 569. The *Violante* court did not address whether an agency's failure to meet its own estimated date of production is automatically a PRA violation.

Here, once the WSP realized that the requested recordings might contain privileged conversations between suspects and their attorneys, which implicated third party privacy rights, disclosure by the initial estimated response date was not feasible. To protect these privacy rights, the WSP developed a methodology to identify responsive recordings without listening to the recordings. This pool of responsive records included nearly six months of digital recordings. As a result, the WSP extended the estimated response date to May 1, 2012, but inadvertently neglected to send another extension letter to Mr. Andrews, due to more than 1,000 additional public records requests.

Mr. Andrews correctly concedes that whether an agency complies with the PRA is a fact specific inquiry and must be decided on a case-by-case basis. Although RCW 42.56.100 requires that agencies provide "the fullest assistance to inquirers and the most timely possible action on requests for information," the statute does not envision a mechanically strict finding of a PRA violation whenever timelines are missed. Rather, the purpose of the PRA is for agencies to respond with reasonable thoroughness and diligence to public records requests. The WSP's thoroughness of response is not an issue

in this case. The uncontested facts in this case establish the WSP acted diligently. We, therefore, affirm the lower court's summary judgment dismissal of Mr. Andrews's lawsuit.

Lawrence-Berrey, J.

WE CONCUR:

Korsmo, J.

Siddoway, C.J.

APPENDIX B

RCW 42.56.100
Protection of public records — Public access.

Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records.

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

[1995 c 397 § 13; 1992 c 139 § 4; 1975 1st ex.s. c 294 § 16; 1973 c 1 § 29 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.290.]

RCW 42.56.520
Prompt responses required.

Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; (3) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (4) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

[2010 c 69 § 2; 1995 c 397 § 15; 1992 c 139 § 6; 1975 1st ex.s. c 294 § 18; 1973 c 1 § 32 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.320.]

Notes:

Finding -- 2010 c 69: "The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online." [2010 c 69 § 1.]

LAW OFFICES
Bishop, Cunningham & Andrews, Inc. (P.S.)
MAILING ADDRESS
Box 5060, West Hills Station
Bremerton, Washington 98312

John A. Bishop
Gary A. Cunningham
John C. Andrews

Telephone (360) 377-7691
Facsimile (360) 377-5484
E-mail: bca@bcalawyers.com

CERTIFICATE OF SERVICE

I, Maryann A. Andrews, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 14th day of October, 2014, I caused a true and a correct copy of the **Petition for Review** to be served on the party/parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or depositing said document in the United States mail.

Shelley Winters, Assistant Attorney General -ShelleyW1@ATG.WA.GOV
Shelley Winters, Assistant Attorney General - CJDSeaEF@ATG.WA.GOV.
Allison Cleveland - AllisonC1@ATG.WA.GOV

Signed in Bremerton, Washington this 14th day of October, 2014.

Maryann A. Andrews