Court of Appeals No. 44284-1-II

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

MICHAEL HOBBS,
Appellant,

v.

STATE OF WASHINGTON, STATE AUDITOR's OFFICE,
Respondent.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Lisa Sutton

BRIEF OF APPELLANT

Christopher W. Bawn, WSBA #13417
1700 Cooper Pt. Rd. SW, #A-3
Olympia, WA 98502
voice: (360) 357-8907
cwbawn@justwashington.com

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The Appellant has assigned error to numerous findings in the trial court, and has attached the various orders to which such error is assigned.

Court's Decision": (dated 2/29/2012, filed 3/1/2012, CP. 172)

Order (dated 3/30/2012, CP. 185-190)

Order (dated 2/15/2012, CP. 138-140)

"Final Order" (11/9/2012, CP. 1360-1375)

TABLE OF AUTHORITIES

COURT RULES, STATUTES, and OTHER AUTHORITIES

CASES

I. ASSIGNMENTS OF ERROR

The Appellant assigns error to the Trial Court's letter opinion and three orders as follows:

#1. FIRST ASSIGNMENT OF ERROR: Error is assigned to the "Court's Decision": (dated 2/29/2012, filed 3/1/2012, CP. 172). The decision letter erroneously concludes the Plaintiff had no cause of action under RCW 42.56 for the agency's erroneous redactions and use of a "generic" exemption list in its December 21, 2011 initial disclosure of records. (See page 3 of letter opinion, referring to the "generic" exemption list.) The letter's findings and conclusions were set out in a separate order, which is the subject of the second assignment of error.

#2. SECOND ASSIGNMENT OF ERROR: Error is assigned to the following findings and conclusions expressed in the court's order, dated 3/30/2012. CP. 185-190. Error is assigned to the following enumerated "findings" in the 3/30/2012 order: findings **#2, #3, #5, #6, #9, #10, #11, #12, #13, and #14** and to the following "conclusions" in the 3/30/2012 order: conclusions **#1, #2, and #3.**

In lieu of retyping each finding and conclusion, the text is attached in the APPENDIX and the errors are laid out in the issues pertaining to the assignments of error section of the brief.

#3. THIRD ASSIGNMENT OF ERROR: Error is assigned to the following "findings" in the 2/15/2012 order, CP. 138-140. Error is assigned to the "findings" in the 2/15/2012 order: **#2 and #3**, and the only conclusion of the order. In lieu of retyping each finding and the conclusion, the text is attached in the APPENDIX and the issues are laid out in the issues pertaining to assignment of error section of the brief.

#4. FOURTH ASSIGNMENT OF ERROR: Error is assigned to the following findings in the 11/9/2012 "FINAL ORDER," CP. 1360-1375. Error is assigned to the "findings" in the 11/9/2012 order: **#6, 7, 8, 9, 13, 15, 16, 17, 18, 19, 20, 21** and to the following "conclusions" in the 11/9/2012 order: conclusion **#1 and #4, #5, #6, #7, #8, #9, #10, .#14, #15, #16, #17, #18, #20, #21, #22, #23, #24, #25; #26; #27; #28; #29, #30, #31, #32** as well as the conclusive order item #1 (denying relief "because the State Auditor did not violate the Public Records Act").

#5. FIFTH ASSIGNMENT OF ERROR: The trial court erred in ignoring the violations of RCW 42.56 when the State disclosed, on December 21, 2011, a heavily-redacted ".pdf" file, which included redactions of materials that were not subject to any exemption; a failure to cite any exemption for some of the redacted material; and the provision of a "generic" redaction list created a year before the public records request, rather than a redaction log specific to each redaction.

#6. SIXTH ASSIGNMENT OF ERROR: The trial court erred in allowing the State two "free" do-overs of the December 21, 2011 disclosure for failing to identify any exemptions in several places where information was redacted, failure to provide an exemption log, and most importantly, erroneously redacting public information from the December 21 initial disclosure and the December 30 do-over, until the court expressly noted the fact that the agency had redacted public information which was ultimately disclosed in the February 27, 2012 do-over.

#7. SEVENTH ASSIGNMENT OF ERORR: The trial court erred in refusing to find a violation of the Public Records Act when

the State failed to disclose the metadata of the 17 Microsoft Word versions of a document; instead, again granting the agency a free do-over.

#8. EIGHTH ASSIGNMENT OF ERROR: The trial court erred in refusing to find a violation of the Public Records Act, when the State closed the request, but failed to disclose numerous public records that had been requested.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Erroneous Redaction, Failure to Cite Exemptions and failure to Provide Exemption Log.** Does RCW 42.56 permit an agency to avoid liability if the agency waits until after litigation has commenced to disclose erroneously redacted records, and to provide an exemption log rather than a "generic" list of potential exemptions applicable to the redacted records? In other words, is RCW 42.56 violated when an agency issues its first installment of redacted records on December 21, 2013, without claiming any exemptions for some of the redactions, receives a lawsuit over the non-disclosure and failure to claim exemptions, and the agency

subsequently issues two "updates" – the first to address the missing exemption claims, and the second to address records that should not have been redacted?

2. **Sanders v. State Dicta:** Did the trial court misapply dicta in the Supreme Court decision in Sanders v. State of Washington, 169 Wn.2d 827, 240 P.3d 120 (2010) as a basis for granting an agency two free do-overs to remove redactions (disclosing public information that was previously withheld) and a second and third chance to provide untimely, previously missing explanations for exemptions that were claimed?

3. **Non-Disclosure of Metadata:** Did the trial court err in refusing to find any liability for failure to disclose requested metadata, when the agency admitted the error, by permitting an agency to correct the non-disclosure during litigation?

4. **Failure to Estimate Date for Completing Disclosure.** Whether an estimated date for completing disclosure could be withheld until six weeks after the request was submitted.

5. **Exclusion of Specific Undisclosed Records.** Whether a request for all public portions of all public records from a specific State Auditor's whistleblower investigation, with numerous examples given, does not require disclosure of records that the State Auditor did not "perceive" as responsive to the request, including backups, tapes, invoices to the DSHS for the investigation, employee calendars and calendar entries, files tabs, and investigator timekeeping data,

6. **Failure to search or disclose backups and other electronic records.** Whether a written request for records contained in "backups" did not require any effort to locate or disclose public records contained on "disaster recovery tapes for backups" where the backups are allegedly not easy to search.

The following issues relate to assigned errors to the trial court's findings and conclusions. These issues are subsumed by the previous six major issue categories, but are laid out here to conform to the assignment of error to the all of the challenged findings and conclusions of the trial court in three separate orders and a "decision" letter.

Whether the trial court erred in the order dated 3/30/2012, Finding #2 that agencies should be allowed to post-litigation "satisfaction" of RCW 42.56, by disclosing previously-redacted public information, correcting a "generic" statutory exemption list and adding missing references to exemptions; and in finding that the agency "satisfied" RCW 42.56.210(3) when its non-compliant disclosures on December 21, 2011, were thereafter corrected with replacement disclosures on December 30, 2011, and February 27, 2012?

Whether the trial court erred in Finding #3 that an agency avoids liability if it "rediscloses" previously erroneously-redacted records, by redacting "less material"?

Whether the trial court erred in the order dated 3/30/2012, Finding #5 that it is not a violation of RCW 42.56 to correct a prior disclosure that referred to a generic list of statutory exemptions (and to correct some redactions that were missing references to any exemptions)?

Whether the trial court erred in the order dated 3/30/2012, Finding #6 by extending dicta in Sanders v. State, supra, to conclude that it was not a violation of the PRA if an agency makes an erroneous disclosure, but decides during litigation "to provide exemption codes and brief explanations of its exemption codes" and "providing additional undredacted text on Pages 27, 40, 137 and 138 in its February 2012 production.")?

Whether the trial court erred in the order dated 3/30/2012, Finding #10 that it is not a "denial" of a public record if an agency subsequently discloses erroneously-redacted records?

Whether the trial court erred in the order dated 3/30/2012, Finding #11 that agencies would be "deterred" from disclosing public records if the agency is not allowed an opportunity during litigation to correct "failed" redactions and missing claims of exemption.?

Whether the trial court erred in the order dated 3/30/2012, Finding #12 that removals of redactions during litigation complies with the agency's duties under the Public Records Act?

Whether the trial court erred in the order dated 3/30/2012, Finding #13 that the public-disclosure of a generic list of statutes, followed by a post-litigation use of "codes" that point to a new list of statutes and explanations satisfies RCW 42.56?

Whether the trial court erred in the order dated 3/30/2012, Finding #14 that the post-lawsuit corrections to the errors in the first installment complied with the requirements of RCW 42.56.)?

Whether the trial court erred in the order dated 3/30/2012, Conclusion of Law #1 that an agency can "comply with the public records act" if, after litigation, it corrects erroneously-redacted records and "updates" its redactions to disclose information it previously withheld?

Whether the trial court erred in the order dated 3/30/2012, Conclusion of Law #2 that an agency can "satisfy" RCW 42.56, after it erroneously redacts records and fails to cite valid exemptions, and litigation ensues, if it subsequently issues "codes" from a generic list of statutory exemptions?

Whether the trial court erred in the order dated 3/30/2012, Conclusion #3 that the Plaintiff "has no cause of action" pertaining to the December 21, 2011 production of erroneously redacted records in the 351-page ".pdf" file, since some missing exemption information was provided on December 30, 2011, and some of the erroneously-redacted records were provided in February 2012?

Whether the trial court erred in the order dated 2/15/2012, FINDING #2, that the post-litigation disclosure of code numbers on December 30, 2011, to go with the redacted materials that were publicly disclosed on December 21, 2011, satisfied the original requirement of RCW 42.56.210(3) for a "brief explanation of how the exemption applies to the records withheld."?

Whether the trial court erred in the order dated 2/15/2012, FINDING #3 in finding that the agency "satisfied" RCW 42.56.210(3) when its non-compliant disclosures on December 21, 2011, were thereafter corrected with replacement disclosures together with a list of exemption codes on December 30, 2011?

Whether the trial court erred in the order dated 11/9/2012, Findings #6, 7, 8, 9, that because of the quantity of records, the agreement to consult with another agency, and the fact that the agency "exercised care in the redaction of confidential information about foster children" and such actions were "reasonable" –the state could defer providing a reasonable estimate of the date the records would be disclosed to the Plaintiff until six weeks after the initial request (from November 28. 2011 (the date the request was received) until January 6, 2012 (the date the estimate was provided)?

Whether the trial court erred in the order dated 11/9/2012, FINDING #13, that the failure to disclose the metadata in seventeen "closing letters" on December 21, 2011, could be "updated" after the lawsuit with seventeen closing letters with the original metadata intact on February 27, 2012. CP. 1360

Whether the trial court erred in the order dated 11/9/2012, finding #15, in rejecting expert testimony about the destroyed/missing metadata in the December 21, 2011 disclosure, because the agency subsequently corrected the error by producing the "original" metadata in February 2012?

Whether the trial court erred in the order dated 11/9/2012, FINDING #16.by concluding that there was "no evidence" that handwritten notes, drafts, or electronic files or folders responsive to the request were destroyed?

Whether the trial court erred in the order dated 11/9/2012, finding #17, that the "plain language of [the Plaintiff's public records request]" does not request a search for disaster plans for backups, tapes, invoice vouchers, employee calendars and calendar entries,

files tabs, or timekeeping data – so those records were not subject to public disclosure."?

Whether the trial court erred in the order dated 11/9/2012 in Finding #18 that the agency did not interpret the term "correspondence" to mean invoice vouchers – so those records were not subject to public disclosure?

Whether the trial court erred in the order dated 11/9/2012, in finding #19, that the agency "could not and did not know" that the Plaintiff was asking for disaster recovery tapes, invoice vouchers, employee calendars and calendar entries, tabs, and timekeeping data... until the Plaintiff clarified in his deposition that his request included a search of disaster recovery tapes, invoice vouchers, employee calendars and calendar entries, tabs and timekeeping data – and that those public records were therefore not subject to public disclosure?

Whether the trial court erred in the order dated 11/9/2012, finding #20 that disaster recovery tapes of the Washington State Auditor are kept for disaster recovery purposes only, not other business purposes, and that the content of the tapes is not searchable in the ordinary manner – and therefore not subject to public disclosure?

Whether the trial court erred in the order dated 11/9/2012, finding #21, that three months was a "short time" to produce 300 emails, and 2,300 pages of records?

Whether the trial court erred in the order dated 11/9/2012, conclusion #1 that the agency met its burden of proof "as to each of the issues raised by [the Appellant?"

Whether the trial court erred in the order dated 11/9/2012, in conclusion #2, that RCW 42.56.520 does not require an agency to provide a reasonable estimate of the completion date of a public records request, and in rejecting that interpretation of the statute that appears in the model rule WAC 44-14-04003?

STATEMENT OF THE CASE

THE PUBLIC RECORDS REQUEST. On November 28, 2011, the Appellant Mike Hobbs (HOBBS), through an attorney, submitted a written public records request to the Washington State Auditor. CP. 105, CP. 1362. The request itself asked for all records from September 1, 2010 through November 28, 2011, involving investigations, audits, whistleblower complaints involving the DSHS, and all underlying data and files associated with all communications by any State Auditor employee or agent and the Secretary of the DSHS from November 1, 2011 to November 28, 2011. CP. 105. The request was specifically narrowed to "all records related to any whistleblower complaint or other investigation involving SSI Dedicated Accounts, although the words "SSI Dedicated Accounts" may not appear on the record. CP. 105. The request included a request to "please preserve ELECTRONIC and NON-ELECTRONIC RECORDS" and "the request includes a request to inspect the actual electronic records, including all backup copies and prior versions, and including all metadata contained therein, in their electronic form." CP. 105. The request offers examples of electronic records, such as "voice mails" or

"other electronic audio formats" or "notes contained in Outlook" or "other custom formats" or "Word" or "Excel" or "Powerpoint" ... "without the metadata destroyed." CP. 105. The request also reminded the agency to disclose the records "as they exist as of the date of the request" not after they are shredded, modified, switched to other formats, highlighted, printed to paper with electronic copy discarded, et cetera. CP. 105. Under a section entitled "Disclose All Records In Whole or Part" – the requestor explained that "to the untrained eye, a record may appear to be identical simply because it has the same "file name" or "title" but it may have been revised numerous times and backed up in electronic form each day, with different information in the metadata... "this request includes all revisions." With regard to the sorts of records that were requested, the request states: "RECORDS as defined by RCW 42.56 are interpreted broadly. Records include but are not limited to files, folders, notes, correspondence, notices, meetings, logs, messages, interviews, cell phone and blackberry text messages and pin messages, deleted email files, emails, Outlook appointment emails and notes, room reservation notices, voice mails, litigation holds, other logs,

other documents, other notes, confidentiality statements, recorded conversations, post-it notes, or other forms of records of an electronic or non-electronic nature. CP. 105-106.

The State Auditor initially responded to the request on December 2, 2011, indicating that the first installment would be available for inspection anytime after December 16, 2011. CP. 108. The response indicated that the remaining records involved "DSHS client records" and due to an agreement with the DSHS, the State Auditor's Office was "unable to anticipate at this time how long DSHS would need to "ensure that all necessary redactions have been made." CP. 108.

THE RESPONSE TO THE REQUEST. On December 21, 2011, the agency transmitted the response to the public records request in the form of three files, downloadable electronically by the Appellant's attorney: "Whistleblower exemption codes.docx" and "10-005_redacted.pdf" (351-pages) and "10-005 ltr VersionHistory.zip" (17 electronic versions of a letter addressed to the Governor and the Secretary of the DSHS). CP. 110.

THE LAWSUIT. The Appellant filed and served the Respondent with a "Complaint for Violations of the Public Records

Act" on December 23, 2011, alleging numerous deficiencies in the State Auditor's disclosure of public records, including failure to cite exemptions and explain them in relation to the redactions, the redaction of non-exempt public information, and failure to disclose some of the requested records and some of the requested metadata. Cp. 11-27, CP. 1362, CP. 102.

REDACTIONS OF NON-EXEMPT RECORDS, and REDACTIONS WITHOUT IDENTIFYING EXEMPTIONS and BRIEF EXPLANATION OF HOW THE EXEMPTIONS APPLIED. The complaint, and a subsequent declaration in support of *in camera review* identified at least 15 records by page number that contained "black box" redactions of what appeared to be non-exempt material within the 351-page .pdf file, some covering an entire page. CP. 101. In addition, the Appellant pointed out that "the agency provided no explanation for the redactions" and only stuck a statute reference on some of the larger black boxes in the .pdf file. CP. 101. The "Whistleblower exemption codes.docx" that was provided is a Microsoft Word document, containing a list of statutory exemptions, but the document was created and last saved in 2010

– many months before the public records request was submitted. CP. 102.

On December 30, 2011, as a result of the lawsuit, the Respondent sent two files to "replace" two of the earlier disclosures, called "10_005_redacted_2.pdf" and "Whistleblower exemption codes_2.docx." CP. 116. As the trial court noted after conducting *in camera* review, the "supplemental production" on December 30, 2011, included "exemption codes along with a brief explanation (which brief explanation had not been previously provided by the State)." CP. 172. Then, on February 14, 2012, the same 351-page pdf file was again revised, removing erroneous redactions from multiple records and including new statutory exemptions and codes; the court noted that the documents on pages #27, #40, #137 and #138 of the .pdf file were modified, with the black box removed from the non-exempt portions of the pages; Pages #137 and #138 were revised so only the foster child's name was redacted, with a citation to RCW 13.50.100. CP. 172. The redaction of the postmark on Page 40, an envelope received by the State Auditor, was removed, disclosing the non-exempt "incoming line, date and time and the postmark visible, rather than being

redacted with a black box as had been done in the two earlier productions." CP. 173.

The court did not consider on the record all the documents in the 351-page .pdf file that the Appellant identified for *in camera* review. CP. 101. The court specifically identified four instances (Page 27, 40, 137 and 138) that it felt the original redactions were not appropriate, but ultimately concluded that the State should be entitled to a broad view of what constitutes a "denial" of the disclosure of public records. CP. 174. The court erroneously felt that the failure to provide a brief explanation of the redacted materials on December 21, 2011, could be cured during litigation, such that RCW 42.56 "should not subject the State to a finding that its conduct on 12-21, 12-30, or on 2-14-2012 amounted to a "denial" of a public record. If this court were to rule otherwise under these facts, it would deter agencies, rather than encourage agencies, to produce records for which claims of exemptions may ultimately fail in an effort to reduce their exposure to potential penalties." CP. 174-175. Instead of merely "reducing" exposure, however, the trial court erronesouly established a new basis for agency evasion of liability altogether. Notably, the trial court shifted

the burden of compliance with RCW 42.56 for the December 21, 2011 to the requestor, indicating that it is the requestor's responsibility "to identify any potential mistake the agency made." CP. 1342

METADATA. With regard to the disclosure on December 21, 2011, the requested metadata was missing from a "zip" archive of 17 versions of a letter the State Auditor prepared – instead, the 17 records were modified on December 6, 2011 by "kim hurley" resulting in the loss of the metadata showing the actual author and correct file modification date(s). See February 9, 2012 Declaration of Chris Bawn. CP. 102. The court noted that the error was not corrected until February 27, 2012, when "the State Auditor updated the December 21, 2011 production with 17 versions of the closing letter with the original metadata." CP. 1364. In the present case, the public records request specifically explained that an "untrained eye" might not realize differences in the records, and asked that the electronic records be disclosed without alteration or erasure, and for the agency to disclose the "metadata" for all electronic versions of the whistleblower investigation closure letter sent from the State Auditor's Office to the DSHS and the governor of Washington. The

agency's witnesses' deposition testimony, brought to the attention by page and line to the trial court, confirmed that original disclosure of the records contained altered metadata by Ms. Kim Hurley on December 6, 2012. (See Trial Brief, page 11, CP. 646, and the depositions attached to the Declaration of Chris Bawn, appearing at CP. 659-693, CP. 706-965, CP. 966-1242 - Exhibit 3 (Deposition of Kim Hurley, page 30, line 2 through 25, page 31, line 1 to 25) and Deposition of Pete Donnell, at 14, line 2 ("Kim Hurley, who prepared the files apparently used a command called "Save As" and, according to your statement, that changed the original metadata."); and Deposition of Expert Mark Rossmiller, at page 154, line 5-18 ("Based on my observations 17 versions of the file, clearly each version had been altered and saved to a new date." Q. And does the result in the loss of metadata? A. Well, whatever changed in the files, whatever words or characters were changed in those files, they are lost to the extent you would have to go back to a previous version to see what was originally there. But given that all the were altered, it wouldn't be possible to determine what had been changed. Q. And in terms of the last saved date, was that

changed in each of the documents once they were re-saved? A. Yes.)

LACK OF REASONABLE ESTIMATE OF CONCLUDING THE DISCLOSURE

As noted above, the State Auditor expressly declined on December 5 and 30, to respond to the Appellant with a reasonable estimate of the time it would take to conclude the disclosure because some records involving DSHS foster children were under a data sharing agreement with the DSHS, and required the requestor to wait until the DSHS *and* the State Auditor both reviewed the requested records. CP. 1363. That agreement contained "no deadline" for the Auditor and DSHS to coordinate and disclose the public records. CP. 696. Nevertheless, the trial court concluded that the existence of the agency data sharing agreement, allowing the two agencies to "consult with each other" allowed the agency to delay its 5-day responsibility to estimate when it would conclude the request until it found out how long it would take from the DSHS on or before January 6, 2012. CP. 1363.

UNDISCLOSED RECORDS. Finally, the court agreed to review a trial brief and witness testimony submitted by the Appellant, involving the "metadata" issue, and any remaining records that had not been reviewed in camera. See Trial Brief, CP. 636-658, and the depositions attached to the Declaration of Chris Bawn, appearing at CP. 659-693, CP. 706-965, CP. 966-1242. As noted in the brief, after the Appellant Mike Hobbs and the witnesses for the Respondent were deposed in June 2012, and Mr. Hobbs provided discovery responses identifying the records the agency witnesses testified they had still not disclosed in response to the public records request; the State Auditor disclosed a new final installment of records on August 2, 2012. CP. 657-658; CP. 1365. The court considered the remaining undisclosed records and the "search" that the State Auditor had conducted in preparing a response to the request (CP. 1366).

During a recess in the hearing, the court requested a declaration containing examples of "Outlook appointment emails and notes" from the investigation that were not disclosed until August 2, 2012. CP. 1303-1348. From the depositions which the court reviewed, (CP. 706-965, CP. 966-1242); the court reviewed

testimony from the Respondent's public records officer, who let another employee, Cheri Elliott, handle the preparation of all of Ms. Elliott's investigation records for disclosure. Deposition of Mary Leider, page 41, line 11. The public records officer also let Cheri Elliot do the redactions of those records, and identify which exemptions would go with the records. Deposition of Mary Leider, page 41, line 20-21. Unfortunately, Cheri Elliot testified that nobody at the State Auditor's Office went over the actual public records request with her until after the lawsuit was filed. Deposition of Cheri Elliott, at page 60, lines 2 through 17. In addition, Ms. Elliott testified that she had "no training" in publicly disclosing metadata. Deposition of Cheri Elliot, at page 9, line 19-24. Thus, she simply scanned and redacted the hard paper copies of the investigation file from a "blue file" and a companion "accordion-type brown file" where she kept paper documents that would not fit in the blue file. Deposition of Cheri Elliott, at page 12, line 3-7, page 15, line 16-25). Ms. Elliott answered "no" when asked if she copied or otherwise prepared copies of the electronic documents from her "electronic case file," until January 31, 2012, when Jean Wilkinson (the agency's lawyer) pointed out to Cheri Elliott that she needed to

go back and look in her "electronic case folder." Deposition of Cheri Elliott, page 23, line 9-23. So, on January 31, 2012, Cheri Elliott looked in the "electronic case folder. I can't say specifically what I was looking for. I looked in there to see what was there. " Deposition of Cheri Elliott, page 25, line 9-12. The only thing she found in the electronic case folder was an electronic copy of the "investigative memo" --- all the other electronic records that made up the rest of the case file were not there. Deposition of Cheri Elliott, at page 25, line 17-21. Ms. Elliott claimed that all the other electronic documents in the electronic case folder had been "removed when the case was officially closed" (Deposition of Cheri Elliott, at page 26, line 1-2) and "at the closing of the case it's deleted." (Deposition of Cheri Elliott, page 21, line 18.) Ms. Elliott claimed she did not know the date the present case was officially closed, or the date that the electronic documents were removed from the electronic case folder. Deposition of Cheri Elliott, at page 26, line 3-7. Ms. Elliott suggested that the day the governor was notified that the investigation had concluded (November 17, 2011) might have been the day she deleted documents from her electronic file, but "I can't say that for sure." Deposition of Cheri

Elliott, page 27, line 21. Ms. Elliott also testified that she prepared electronic timesheets to track all the work she performed while investigating the Whistleblower complaint, so the agency could bill the DSHS for her work, but she did not provide those electronic records, either. Deposition of Cheri Elliott, page 59, line 6-16.

The Appellant pointed out to the trial court that the failure to retain and disclose the requested electronic records, including their metadata, because Ms. Elliott thought all she needed to provide was what had been printed in hard copy and placed in the "blue file" is a violation of RCW 42.56, and Washington's Digital Retention Rules at WAC 434-662-040: "Electronic records must be retained in electronic format and remain usable, searchable, retrievable and authentic for the length of the designated retention period. Printing and retaining a hard copy is not a substitute for the electronic version unless approved by the applicable records committee. An agency is responsible for a security backup of active records. A security backup must be compatible with the current system configuration in use by the agency."

Notably, the public records request in this case explicitly instructed the agency that it should check its backups to ensure that it had

disclosed any electronic records that had been archived. Ms. Elliott explained that during her investigation, she would also take "handwritten interview notes," but those could not be disclosed in this case because she had learned from a former co-worker, to "transcribe your notes and then shred." Deposition of Cheri Elliott, at page 47, line 15. The transcribed notes are not "verbatim" copies of the handwritten notes, "there might be additional information that I add so that I'm clear and concise." Deposition of Cheri Elliott, at page 47, line 16-24. Ms. Elliott testified that nobody had ever discussed the records retention value of handwritten notes with her. Deposition of Cheri Elliott, page 48, line 12-21. She testified that the "work papers" had to be retained for "seven years," although she did not know how long the retention schedule was for the documents she had created electronically in Microsoft Word, and as far as she knew, there was no records retention schedule for handwritten interview notes. Deposition of Cheri Elliott, at page 40, line 4-11.

Ultimately, the trial court erroneously decided that the "plain language" of the request did not include a request for "disaster plans for backups, tapes, invoice vouchers, employee calendars

and calendar entries, files tabs or timekeeping data" and the Auditor did not interpret "correspondence" as including invoice vouchers the State Auditor sent to the DSHS for conducting the investigation. CP. 1365.

The trial court therefore rejected all the claims that RCW 42.56 had been violated and entered judgment for the Respondent. The Appellant filed this timely appeal.

ARGUMENT

ISSUE #1: RCW 49.56 DOES NOT GIVE AGENCIES TWO "FREE DO-OVERS" TO CORRECT PUBLIC DISLCOSURE ERRORS DURING LITIGATION – Including Erroneous Withholding due to Over-Redaction and Redaction Errors, and Failure to Cite Exemptions, and failure to Provide Brief Explanations for the Redactions.

Agency actions under the Public Records Act are reviewed *de novo.* Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn. 2d 702, 715, 261 P. 3d 119 (2011) (citing RCW 42.56.550(3)); Confederated Tribes v. Johnson, 135 Wn. 2d 734, 744, 958 P. 2d 260 (1998). The Public Records Act "requires all state and local agencies to disclose any public record upon request, unless the record falls within certain very specific exemptions." Progressive Animal Welfare Society v. Univ. of Washington, 125 Wn. 2d 243, 250, 884 P. 2d 592 (1994)(PAWS). RCW 42.56 is a strongly worded mandate for broad disclosure of public records. Neighborhood Alliance, 172 Wn. 2d at 714. In light of this purpose, the PRA is liberally construed in

favor of disclosure and its exemptions are narrowly construed. RCW 42.56.030. Under the PRA, agencies must respond within five business days of receipt of a public records request by "(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... 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. RCW 42. 56. 520. An agency may withhold all or part of a record if it falls within an exemption under the Public Records Act or other statute which exempts or prohibits disclosure of specific information or records. RCW 42.56.070(1). If an agency refuses to permit public inspection of particular records, "[t]he burden of proof shall be on the agency - to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW

42.56.550(1). An agency must provide an explanation of how the exemption applies to the specific record withheld. PAWS, 125 Wn. 2d at 270. Providing the required explanation is important not only because it informs the requester why the documents are being withheld, but also because failure to provide the explanation " vitiate[s]" the reviewing court' s ability to conduct the statutorily required de novo review." Gronquist v. State Dept. of Licensing, published No. 41897-5-II (Jul. 30, 2013)(citing PAWS, 125 Wn. 2d at 270) and Sanders v. State, 169 Wn. 2d 827, 846, 240 P.3d 120 (2010)("Claimed exemptions cannot be vetted for validity if they are unexplained."). To comply with the PRA, the agency must provide an explanation that specifically describes how the claimed exemption applies to the withheld information because "[a]llowing the mere identification of a document and the claimed exemption to count as a ` brief explanation' - would render the law's brief explanation clause superfluous." Gronquist, supra, (citing Sanders, at 846). One method by which an agency can properly identify withheld information is with a privilege log. Rental Hous. Assn of Puget Sound v. City of Des Moines, 165 Wn. 2d 525, 538-39, 199 P. 3d 393 (2009) (citing WAC 44-14-04004(4)(b)(ii)). The log

should include the type of information that would enable a records requester to make a threshold determination of whether the agency properly claimed the privilege. WAC 44-14-04004(4)(b)(ii); Rental Hous. Ass' n, 165 Wn. 2d at 539. Thus, a response denying public disclosure of a record in whole or part must "(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." Koenig v. City of Lakewood, Published No. 42972-1-II (Sept. 04, 2013) ("While the city had cited statutes that would or might exempt some of the requested information, it failed to provide a brief explanation as to why the exemptions applied. Failure to give a brief explanation entitled Koenig to costs and attorney fees."). Redaction of non-exempt portions of a record is a violation of RCW 42.56. Mechling v. City of Monroe, 152 Wn. App. 830, 222 P.3d 808 (2009).

Once a court determines that a requester was entitled to inspect public records, the trial court is *required* to impose a penalty within

the statutory range for each day the records were withheld, even if one of the parties promptly seeks a judicial determination as to the propriety of the disclosure. Soter v. Cowles Pub. Co., 162 Wn.2d 716, 162 Wn.2d 716, 754-756 (2007)(emphasis in original)(citing Koenig v. City of Des Moines, 158 Wn.2d 173, 189, 142 P.3d 162 (2006)). The trial court may not reduce the penalty period, even if the requester could have filed suit against the agency sooner than it did. Soter, (citing "*Yousoufian,* 152 Wn.2d at 438."). Fortunately for the respondent in this case, unlike the Appellant in Yousoufian, the Appellant in the present case sought judicial review quickly, "curbing, but not eliminating, the accumulation of the per diem penalties." Soter (citing Br. of Amici Schools Risk Mgmt. Pool at 18.).

The present trial court elected to "eliminate" the penalty, instead of noting that the multiple post-lawsuit revisions merely curbed the accumulation of penalties. There is no room in the Public Records Act for complete negation of the requestor's complaint under the facts presented in this case. The rule is clear, a records requestor "prevails" against an agency if the agency

violates the statute. Germeau v. Mason County, 16 Wn.App. 789, 811, 271 P. 3d 932, review denied, 174 Wn.2d 1010 (2012).

The trial court concluded that the failure to provide a brief explanation of the redactions in the agency's original response on December 21, 2013, before litigation ensued, does not constitute a stand-alone violation of the Public Records Act. This conclusion has been rejected by the appellate courts, as stated most recently in Koenig v. City of Lakewood, No. 42972-1-II (Sept. 04, 2013)(reviewing the failure to provide a brief explanation of the exemptions in the "original response" to a public records request, and concluding that the plain language of RCW 42.56.210, entitles a requestor to costs and attorney fees when the responder fails to provide the required brief explanation of the exemption). A statement that is limited to identifying the information that is withheld and baldly citing a statutory exemption violates the brief explanation requirement. Koenig, (citing Sanders, 169 Wn.2d at 845–46). Notably, the court in Koenig did not seem to involve as severe a violation as occurred in this case, where the trial court found four redactions of allegedly exempt records that were clearly

inappropriate – but allowed the redaction errors to also be corrected without imposing liability.

In Gronquist, the "wrongful withholding" occurred because the agency waited until after the requestor initiated a lawsuit to explain its reasons for redacting information, coupled with the fact that some of the redacted items were not exempt, and the agency failed to specify what information had been redacted and how the exemptions applied. Gronquist, citing RCW 42.56.210(3), and Sanders, 169 Wn.2d 846. See also Resident Action Council (RAC) v. Seattle Housing Authority, 177 Wn.2d 417, 299 P.3d 651 (2013)(redacting too much information under a claim of exemption).

The records in this case apparently contained the whistleblower's name, foster children's names, social security numbers, but the agency apparently chose to not identify what it redacted and instead withhold whole pages of information in some instances, including the publicly discloseable names of the state employees who were involved in the foster care program on those pages, as well as such mundane public information subject to disclosure as the postmark and receipt stamp on an envelope. In Resident Action Council, the court explained that only the exempt

portions, such as welfare recipients' personal information is exempt from disclosure. The court concluded that the Public Records Act requires specific redaction and disclosure of the remaining non-exempt portions of public records, insofar as all exempt material can be removed. In essence, heavy-handed over-redaction does not comply with RCW 42.56. Here, the over-redaction is particularly severe, because no effort was made to explain each redaction.

The misuse of the Sanders decision by the trial court in this case, giving this agency two erroneous "free" do-overs of the non-compliant wrongful non-disclosure of public records, is clearly a backwards step and violates the extensive precedent (including Sanders, Koenig, Gronquist and Resident Action Council) to enforce the strongly worded mandate to disclose the records, and requiring agencies to prepare sufficient explanations of the allegedly exempt areas that were redacted. Notably, had the Respondent in this case done its job, consistent with the law, by preparing the brief explanation of the exemptions for each of its original disclosures and redactions, it would have clearly been in a better position to spot its errors, which would better serve the

purpose of RCW 42.56 than allowing the agency to shirk its duty by disclosing what the trial court found was a "generic" set of exemptions, and the metadata showed was a list the agency lawyer drafted up a year before the request was even submitted, that erroneously claims exemptions to all the redactions in the response, without any individual explanations of the specific items being redcated – shifting the burden unfairly to the requestor to look at each of the "black boxes" to attempt to notify the agency that the withheld records appear to contain information that should not have been redacted.

ISSUE #2: METADATA. Did the trial court err in refusing to find liability for failure to disclose metadata, by permitting an agency a "metadata do-over" in order to correct the non-disclosure after litigation ensured..

If requested, all metadata that is part of an electronic public record should be disclosed with the record. O'Neill v. City of Shoreline, 170 Wn.2d 138, 151-52 (2010). In O'Neill, the court ultimately directed the City to check the original records on the home computer of the deputy mayor, to determine whether the metadata was "identical" to the metadata that was already

disclosed to the O'Neills, If the City failed to check the hard drive as directed, the City would "indisputably not [have] provided all public records to the O'Neills." If the City found that the metadata was not identical to the original disclosure, the City would have to disclose it and explain the non-disclosure to the trial court.

Mike Hobbs request in this lawsuit specifically called attention to the need to disclose all non-identical "versions" of the electronic records, including the existing metadata, rather than allowing an untrained person to treat one of the versions the same as another. In December 2011, the agency concluded the disclosure by providing 17 electronic versions of a letter, without the requested metadata. Instead, the letters contained replacement metadata, such as the electronic "author" and the date each version was last "modified." CP. 102. Although the agency's own in-house IT specialist, Pete Donnell, offered excuses for Kim Hurley's failure to disclose the proper metadata in the agency's original disclosure (see deposition testimony cited in the Statement of the Case, and the declarations at CP. 245-247, CP 323-336, 403-416) the agency's mistake should not be one the Plaintiff had to identify in a lawsuit before the agency bothered to ask its IT specialist to

recover and disclose. In December 2011, the requestor filed a lawsuit and in February 2012, the requestor filed a declaration in anticipation of in camera review, demonstrating for the trial court some of the technical aspects of the missing metadata. There agency in this case introduced no credible evidence to justify a "free pass" from the trial court for its failure to disclose the requested metadata until compelled to do so in this lawsuit, just before the court conducted *in camera*.review related to the Appellant's claims. As noted previously, the Supreme Court in Soter established a bright line rule, once a court determines that a requestor was entitled to inspect public records that were withheld, the court is *required* to impose a penalty within the statutory range for each day records were withheld, regardless of the fact that the "penalty period" was short, or whether the requester could have filed suit against the agency sooner than it did. Quick lawsuits, resulting in disclosure may "curb" but do not eliminate the accumulation of the per diem penalties. Soter.

ISSUE #3. Failure to Estimate a Date for Completing the Disclosure. Whether an estimated date for completing disclosure

could be expressly withheld, and not identified until six weeks after the request was submitted, based upon an open-ended agreement to confer with another agency?

RCW 42.56.520 provides that "within five business days of receiving a public record request, an agency, ... must respond by either (1) providing the record; (2) providing an internet address...; (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." When challenging the "estimate" in the 5-day letter, RCW 42.56.550(2) requires a trial court to determine whether the estimate the agency provided was reasonable.

Statutes should be construed to determine the Legislature's intent. Dep't of Ecology v. Campbell & Gwynn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Id. at 9-10. "When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty." Smith v. Okanogan County, 100

Wn. App. 7, 13, 994 P.2d 857 (2000). In Smith, the court reviewed numerous requests and responses of various County departments. The court determined that Smith had submitted a valid public record request for "a copy of each judge's oath" on September 4, 1996, and the Okanogan County Superior Court Administrator's Office acknowledged the request on September 9th by indicating that the letter had been filed with the Court. Although the response was timely, the Court of Appeals explained that the response did not comply with the statutory requirement to provide the record, provide a reasonable time in which the requested records will be provided, or deny the request. The court concluded that the inadequate response violated the public records act. As the model rules explain, the burden of proof is on an agency to prove its estimate of time to provide a full response, (RCW 42.17.340(2), 42.56.550(2)) and an agency should be prepared to explain how it arrived at its estimate of time and why the estimate is reasonable. See WAC 44-14-04003.

The trial court rejected the plain reading of the statute, as well as the common-sense interpretation of the 5-day requirement contained in the model rules at WAC 44-14-04003 (4)(c):

"Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to fully respond."

Instead, the trial court upheld a new option, allowing a 5-day letter to identify the existence of a "data sharing" agreement that allows the responding agency to expressly refuse to provide an estimated response date, until it consults at some point in the future with another agency. The trial court apparently believed the involvement of a second agency justified the six-week delay of the 5-day letter in this case, until January 2012, when an estimate of a future date for disclosure of the records was first disclosed. This sort of non-responsiveness by an agency was rejected in Doe I v. Washington State Patrol, 80 Wn.App. 296, 304, 908 P.2d 914 (1996)(untimely response by State Patrol, which it tried to blame the delay on the fact that the records were still awaiting a review by a Puerto Rico prosecutor, the court held that this was a violation of the act). See also *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C.Cir), *vacated in part on other grounds upon panel reh'g*, 711 F.2d 1076 (D.C. Cir. 1983)("[W]hen an agency receives a FOIA request for 'agency records' in its possession, it must take

responsibility for processing the request. It cannot simply refuse to act on the ground that the documents originated elsewhere.")

A plain reading of RCW 42.56 confirms that the person requesting the records can expect to wait up to five business days for the agency's estimate of a future date the agency anticipates it will disclose the records. There is no wiggle room in the statute for an express refusal to provide such an estimate until an unspecified future date. To ensure the 5-day requirement is met, the statute even includes some examples of excuses an agency can use to justify an extended period that it will take to disclose the records. In West v. Wash. State Dep't of Natural Resources, 163 Wn. App. 235, 244, 258 P.3d 78 (2011), the court explained that a failure to respond within five days violates the act, and no "reasonableness test" applies to an overdue response. Obviously, the agency was aware of the records it needed to review with the DSHS, and could have used the five business days to contact the DSHS, which readily estimated it would take two or three weeks to completely review the records. See Trial Brief, page 6-8, CP. 641-643, and the depositions attached to the Declaration of Chris Bawn, appearing at CP. 659-693, CP. 706-965, CP. 966-1242: Deposition

of Jan Jutte, page 35, lines 13-15. Jutte said that the estimate "wavered at times" but in the end, the DSHS took about as long as Ms. McPherson had initially said. Deposition of Jan Jutte, page 36, line 4- Ms. McPherson confirmed that the DSHS only needed "a couple weeks" to go through the records to determine if any information needed to be redacted under RCW 13.50.100. Deposition of Barbara McPherson, at page 24, lines 6-24.

An "estimate" is just that, and although a 6-month estimate may be reasonable in some cases, the statute does not contain the option of an expressly refusing to provide any estimate for disclosure of the records until the agency feels good and ready to provide the estimate six weeks after the statute says the estimate should be given. Courts have explained that the agency will bear the burden of proving that the time estimate it provided to the requestor was reasonable. Zink v. City of Mesa, 162 Wn. App. 688, 712, 256 P.3d 384 (2011), review denied, 173 Wn.2d 1001 (2012). Here, the agency could not meet that burden because it elected not to provide a time estimate at all. Here, the trial court's findings contain irrational excuses, such as the number of requests that were pending in the agency at the time of the request, and the

number of pages of DSHS records involved, and the fact that the agency had an agreement to consult with the DSHS. All of those excuses could have been incorporated in the reasonable estimate the statute states *unambiguously* is to be provided within 5 business days. Here, the trial court interpretation rewards agencies that violate the 5-day letter rule, as long as they can come up with a list of excuses for failing to provide the information that is supposed to be provided in the five day letter. Obviously, the statute is meaningless if the term 5-days actually means six weeks, depending on how many excuses the agency identifies for not providing an estimate. Nowhere in RCW 42.56 does the legislature provide that the 5-day estimate letter can be delayed for six weeks due to an "agreement" with another public agency. If the State Auditor wants to enter into agreements to incorporate another agency's review in its own public records responses, it could easily indicate to the other agency that such review opportunity must be completed within some specified period from the date of the initial public records request, absent extenuating circumstances.

ISSUE #4: Exclusion of Specific Undisclosed Records and ISSUE #5: Failure to search for or disclose backups. . Whether a request for all public portions of all public records from a State Auditor's whistleblower investigation, with numerous sorts of records identified, does not require disclosure of records that the State Auditor "did not consider responsive" to the request, and does not include "disaster plans for backups, tapes, invoices to the DSHS for the investigation, employee calendars and calendar entries, files tabs, and investigator timekeeping data"?

The trial court abused its discretion when it concluded that there was no duty to disclose records "the State Auditor did not consider responsive." This violates the broad definitions in the request itself and in the statute for what constitutes records and "writings" and the mandate to provide the fullest assistance in responding to requesters. RCW 42.56.100. An agency must conduct an objectively reasonable search for responsive records. A requestor is not required to "ferret out" records on his or her own. WAC 44-14-04003(9)(citing Daines v. Spokane County, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some

combination of 'intuition and diligent research'"). The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 720, 261 P.2d 119 (2011). Here, the agency testified that it assigned the job of providing the investigation files to the investigator, who only searched for and disclosed the paper records the investigator scanned from a "blue" and a "brown" folder – until well after the lawsuit was commenced, when the agency's lawyer told the investigator (who was never shown the actual request), that she needed to also disclose electronic records. An agency "is not required to be a mind reader when responding to public records requests." Bonamy v. City of Seattle, 92 Wn. App. 403, 409 (1998). Nevertheless, this court should not condone situations in which the agency admits the person tasked with searching for the records did not even read the written request and "perceived" that the request was just for paper records, and when the person belatedly looked for the electronic records and found they were not where they used to be on her computer, the agency refused to look anywhere else, including its

backups. See Neighborhood Alliance. A trial judge should closely scrutinize what the person collecting the investigation records did, and when those actions were performed. Ms. Ellis claimed the folder she initially accessed in January 2012 no longer contained anything but an electronic copy of a closing memo (not disclosed on December 21), and that the other electronic records were no longer there because they would have been removed sometime after the investigation was closed. The problem here is that the request itself refers to electronic and paper records of the specific investigations of SSI Dedicated Accounts that Ms. Ellis conducted, and the request asked for the agency to disclose "all backup copies and prior versions" and, in describing the types of records that were requested, the request specifically identified that the requestor was expecting the agency to disclose: "files, folders, notes, correspondence, notices, meetings, logs, messages, interviews, ... emails, Outlook appointment emails and notes, room reservation notes, voice mails..."

While a court can claim an agency is not required to read the mind of a requestor, here any reasonable person reading the request would have known the requestor provided an exhaustive

list of items aimed at "ferreting out" all the records – it specifically referenced "Outlook appointment emails" and there is absolutely no doubt that the agency's "perception" and search for records was not reasonable. The agency did not disclose some of the most basic electronic records of the investigation it conducted, including the Outlook appointment records, the investigator's diary of the time she spent on the investigation, and the invoices that were sent to the DSHS on the basis of the diary entries. These new items were not disclosed until August 2, 2012, when the court compelled the agency to disclose them prior to the hearing. See Trial Brief, page 11, CP. 646; and Declaration, CP. 1303-1348.

The written request for records also included a request for records contained in "backups." At great expense to the public, the State must maintain such backups. See Washington's Digital Retention Rules at WAC 434-662-040. The trial judge's findings indicate the state was not required to check its backups, because the agency apparently only expected to use those for disasters, and the electronic records in the backups were not stored in a manner that could easily be retrieved. This is clearly a violation of RCW 42.56, because there is no statutory exemption from public

disclosure of records requested from backups, whether the backup is allegedly only useful for "disaster" recovery, archival purposes, or to ensure the agency is not in violation of its records retention rules.

Washington's State Auditor is responsible for auditing and investigating complaints over the misuse of billions of dollars of public funds in this state, including the federal SSI Dedicated Funds investigation at issue in this request. The Auditor admits that it retains backups of its electronic investigation records, but made zero effort to check the backups, and did not inform the requestor that it was or was not going to check its backups in response to the request to check the backups. This was particularly problematic, because the person searching for records concerning the investigation testified she did not even know she was looking for electronic records, and when she was belatedly told by her lawyer, she went to her own computer folder, and all but one of the electronic records that were usually kept there were gone. As in Neighborhood Alliance, the duty to disclose records does not end when the records are not found in the first place the agency looks, particularly when the agency personnel looking for the

records indicates the records were "removed" – obviously, someone in the agency must know where those records went – and if not – they are on the backup. Because the request included a request to check backups, and the agency was aware that there were electronic records had been moved from the spot where they were normall kept, this court should take the same sort of initiative the Supreme Court and the Court of Appeals took in O'Neill v. City of Shoreline, 170 Wn.2d 138, 151-52 (2010), and order the agency to check those backups and to disclose the electronic records concerning the investigation that are contained there; and if the agency intentionally chooses not to check its backups as it refused to do in this case, it should be considered a *per se* violation of RCW 42.56.

REQUEST FOR FEES

The Appellant in this matter seeks relief in the Court of Appeals for violations of RCW 42.56 as well as the fees and costs for having to pursue this appeal. The statute allows for an award of attorney fees and this court has interpreted that statute as permitting an award on appeal.

CONCLUSION

The Appellant respectfully requests reversal of the trial court decision, coupled with a remand for further action in the trial court that is consistent with RCW 42.56 and with the decision of the Court of Appeals.

Proof of Service: I certify that the Brief of Appellant was served on this date to Ms. J Wilkinson, Assistant Attorney General, at the office of the Attorney General.

Respectfully submitted October 9, 2013.

Christopher W. Bawn, WSBA #13417
Attorney for Defendant/Appellant

APPENDIX

The Appellant has assigned error to numerous findings in the trial court, and has attached the various orders to which such error is assigned.

Court's Decision": (dated 2/29/2012, filed 3/1/2012, CP. 172)

Order (dated 3/30/2012, CP. 185-190)

Order (dated 2/15/2012, CP. 138-140)

"Final Order" (11/9/2012, CP. 1360-1375)

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Superior Court of the State of Washington
For Thurston County

Paula Casey, *Judge*
Department No. 1
Thomas McPhee, *Judge*
Department No. 2
Christine A. Pomeroy, *Judge*
Department No. 3
Gary R. Tabor, *Judge*
Department No. 4

Chris Wickham, *Judge*
Department No. 5
Anne Hirsch, *Judge*
Department No. 6
Carol Murphy, *Judge*
Department No. 7
Lisa L. Sutton, *Judge*
Department No. 8

2000 Lakeridge Drive SW • Building No. Two • Olympia WA 98502
Telephone (360) 786-5560 • Fax (360) 754-4060

February 29, 2012

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Christopher W. Bawn
Attorney at Law
1700 Cooper Point Rd. SW Bldg A3
Olympia, WA 98502-1109

Jean M. Wilkinson, AAG
P.O. Box 40100
Olympia, WA 98504-0100

Re: *Mike Hobbs v. State of Washington et al*
Thurston County Cause No. 11-2-02725-0

Dear Counsel:

The State Auditor's Office filed a Motion Regarding Exemption Codes and requested this court issue a ruling on the *in camera review* of disks 1-3. Both parties requested this court conduct an in camera review of disks 1-3 as provided for under RCW 42.56.550(3) which motion and request this court granted. The court reviewed all documents provided for in camera review.

The State's initial production took place on Dec. 21, 2011. The State's supplemental production took place on Dec. 30, 2011 at which time the SAO provide plaintiff with exemption codes along with a brief explanation (which brief explanation had not been previously provided by the State). On February 14, 2012, SAO provided a 2nd supplemental production disclosing 5 pages, with one page of an additional exemption code (p. 122) and with text on p. 137 and 138 now provided, but redacting the foster child's name on pages 137 and 38 citing RCW 13.50.100. Both the December 30, 2011 and the February 14, 2012 productions included a list of exemption codes

and brief explanation of those codes as required by the PRA, RCW 42.56.210(3). On Feb. 14, 2012, p. 40 was produced with the incoming line, date and time and the postmark visible, rather than being redacted with a black box as had been done in the two earlier productions.

In a prior hearing, the court, after conducting its *in camera review*, inquired specifically about p. 40, 137 and 138 and asked counsel to specifically answer questions about those redacted pages in its oral arguments. At the hearing on February 24, 2012, the court mainly focused its remaining questions on pages, p. 40, 137 and 138.

The Washington Supreme Court's opinion in *Sanders v. State* reiterates the public policy of the PRA to provide public access to public records. The *Sanders* decision addresses the issue of whether new explanations for withholding records offered during litigation amounted to a waiver or estoppel as petitioner Sanders argued. The Court found that PRA requests would be too slow if an agency's initial responses were binding upon the agency. "The Court emphasized that "This is exactly the outcome we wished to avoid in *PAWS II*." *Sanders* at 847. The Court in *Sanders* also rejected the notion that a requestor should be compelled to litigate, while allowing the agency to escape sanctions by offering better explanations of its exemptions later. *Id.* The Court concluded that because the State had improperly withheld documents, its failure to provide a brief explanation should be considered in determining the proper amount of penalty, costs, and fees. The Court held that the State agency would not be foreclosed from providing a satisfactory explanation. The court reasoned that this approach reflected a fair middle ground under the PRA. "Such an interpretation serves the PRA's policy of disclosure by providing incentives for the agency to explain its claimed exemptions, while avoiding the negative consequences warned of in *PAWS II*." (citations omitted). *Id.* at 848. The Court also stated that "We decline to penalize agencies that cooperated with PRA litigants in this manner by construing such cooperation as a waiver." *Id.* at 849.

Here, the State responded to petitioner's public records request on 12-21-2011 production. The State then supplemented its earlier production by providing petitioner with a brief explanation of its exemption codes [1], [2], and [9] in its 12-30-2011 production. Petitioner takes issue with the list of

brief explanations and exemption codes [1] through [9] because not all codes/explanations listed on the sheet were used by the State here. Apparently, the State Auditor uses this form as a generic exemption code/brief explanation for whistleblower cases under the whistleblower statute, RCW 42.40.040(2) and then identifies in the production of redacted documents which exemption codes for a particular redaction the State is relying upon. Petitioner's objection to this process does not create a separate cause of action under the PRA, RCW 42.56.520(1).

Petitioner also objected to the State's additional information (the brief explanations provided for the exemption codes in the 12-30-2011 production and the recent 2-24-2012 production with one additional exemption code on one page (p. 122) and additional text now disclosed on pages 137-138). Petitioner argues that these additions create a separate cause of action under R CW 42.56.550(1). Under *Sanders,* 169 Wash.2d 827, 849, the State's failure here to provide a brief explanation warrants penalties only if this court determines the State wrongfully withhold documents.

Sanders emphasized that the PRA provides an incentive for agencies to produce records for which claims of exemption may fail in an effort to reduce their exposure to potential penalties. Similarly, the language in WAC 44-14-04004 provides for disclosure of public records in installments, if applicable. This regulation addresses the failure to provide records and defines when a "denial" of a request can occur. There are 4 types of "denial" listed: the agency does not have the record, fails to respond to a request, claims an exemption of the entire record or a portion of it, or without justification, fails to provide the record after the reasonable estimate expires. WAC 44-14-040004(4).

Consistent with the analysis in *Sanders* and the PRA's purposes, the State should not be penalized for providing a brief explanation of its exemption codes in the 12-30-2011 production and for listing one more page on p. 122 in its 2-14-2012 production, or for providing additional unredacted text on pages 137 and 138 in its 2-24-2012 production. Similarly, the State's 2-12-2012 supplemental production furthering disclosing material it had previously redacted should not subject to the State to a finding that its conduct on 12-21, 12-30, or on 2-14-2012 amounted to a "denial" of a public record. If this court were to rule otherwise under these facts, it would deter

agencies, rather than encourage agencies, to produce re cords for which claims of exemption may ultimately fail in an effort to reduce their exposure to potential penalties. This Court finds that the State's exemption codes as now reflected in the three productions to date complied with the PRA's requirements and do not amount to a "denial" subject to a cause of action under R CW 42.56.550(1).

The State is directed to prepare an Order consistent with the Court's ruling.

Sincerely yours,

Lisa Sutton
Superior Court Judge

LS/dkr

cc: Court File

6 MC PUBLIC 1

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2012 MAR 30 PM 2:33

BETTY J. GOULD, CLERK

☐ EXPEDITE
☐ No Hearing Set
☐ Hearing is Set: Presentation of Order
Date: 3/30/2012
Time: 1:30 p.m.
THE HONORABLE LISA L. SUTTON

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

MIKE HOBBS, Plaintiff, v. STATE OF WASHINGTON, WASHINGTON STATE AUDITOR'S OFFICE, a Washington State Agency, Defendant.	NO. 11-2-02725-0 ORDER ON *IN CAMERA* REVIEW OF DECEMBER 21 AND 30, 2011 AND FEBRUARY 14, 2012 PRODUCTIONS

THIS MATTER came before the Court on February 24, 2012 after *in camera* review of the productions provided on December 21, and 30, 2011 and February 14, 2012 in response to Plaintiff's attorney's records request, PRR# 1513 WB 10-005 - DSHS. The Court reviewed a copy of the December 21 and 30, 2011 and February 14, 2012 productions that allowed the Court to review the redacted material and the exemption code associated with each redaction; and the list of exemption codes provided by Defendant to plaintiff's attorney on December 30, 2011 (copy attached).

The Court considered the arguments of counsel on February 24, 2012 and the following:

1. Defendant's Motion in Support of Auditor's Exemption Codes;
2. Declaration of Chris Bawn Re: Index of Records Submitted for In Camera Review;

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1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

3. Defendant's Reply Re: In Camera Review and Adequacy of Exemption Codes, and Declaration of Jean Wilkinson in Support thereof and its exhibit;
4. Declaration of Mary Leider In Support Of Motion To Set Case Scheduling Order and exhibits thereto;
5. Declaration #2 of Chris Bawn, dated February 15, 2012;
6. Defendant's Motion Re: *In Camera* Review of Redactions, dated February 17, 2012;
7. Plaintiff's Answer to Motion, dated February 22, 2012;
8. Defendant's Reply Re: *In Camera* Review of Redactions, dated February 23, 2012;
9. Transcript of February 24, 2012 motion hearing.
10. Plaintiffs Request for Reconsideration and Proposed Suppl. Findings & Corrections for Mtn Re: In Camera Review.

The Court issued a letter ruling dated February 29, 2012 ruling in favor of Defendant. The Court being fully advised in the premises finds and concludes:

1) The Auditor's first produced installment #1 on December 21, 2011. It contained a 351 page ".pdf" file with redactions.
2) The Auditor updated its production of the 351 page ".pdf" file on December 30, 2011, at which time the Auditor marked redacted material with exemption codes, and provided plaintiff with a list of exemption codes along with brief explanations (copy attached).
3) On February 14, 2012, the Auditor provided a 2nd supplemental production re-disclosing five pages from the 351 page ".pdf" file: page 122 has an additional exemption code; and pages 27, 40, 137, and 138 redact less material than in the December 21, and 30, 2011 productions.

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1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

4) The court reviewed items 1), 2), and 3) as part of its *in camera* review of the unredacted 351 page ".pdf" file.

provided on 12-30-2011 (see attached) JS JW ewb

5) The Auditor's list of brief explanations and exemption codes does not create a cause of action under RCW 42.56.550(1), even though some of the codes are not used in the Auditor's production.

6) *Sanders v. State*, 169 Wn.2d 827 (2010), found that responses to Public Records Act requests would be too slow if the agency's initial explanations for claimed exemptions were binding on the agency. Agencies therefore may provide new explanations. *Sanders* at 847. In addition, *Sanders* emphasized that the Public Records Act encourages agencies to produce records for which claims of exemption may fail. *Sanders* at 849-50.

7) WAC 44-14-04004(3) provides for disclosure of public records in installments. Here, the court conducted *in camera* review of a portion of a first installment.

8) RCW 42.56.550(1) provides a cause of action when an agency denies an opportunity to inspect and copy a record. WAC 44-14-04004(4) lists four types of denial: the agency does not have the record; fails to respond to a request; claims an exemption for an entire record or a portion of it; or without justification fails to provide the record after the reasonable estimate expires.

it was not a violation of the PRA JS JW ewb

9) Consistent with the authorities set forth in 6), 7), and 8), the Auditor ~~should not be penalized for providing~~ to provide exemption codes and brief explanations of its exemption codes in the December 30, 2011 production; or for listing one more code on p. 122 in its February 14, 2012 production; or for providing additional unredacted text on pages 27, 40, 137 and 138 in its February 14, 2012 production.

10) Consistent with the authorities set forth in 6), 7), and 8), the Auditor's February 14, 2012 supplemental production further disclosing material it had previously redacted

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1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

should not subject the Auditor to a finding that its conduct on December 21, December 30, or on February 14, 2012 amounted to a "denial" of a public record.

11) If the Court were to rule otherwise than set forth in 9) and 10), agencies would be deterred from producing, rather than encouraged to produce, records for which claims of exemption may ultimately fail. The interpretation adopted here serves the purposes of the Public Records Act.

12) The redactions made in the December 30, 2011 production, as updated in the February 14, 2012 production of pages 27, 40, 122, 137, and 138, are proper under the statutes and authorities cited in the Auditor's exemption codes [1], [2], and [9]. These redactions comply with the Public Records Act.

13) That codes [1], [2], and [9] satisfy the requirement of RCW 42.56.210(3) for a "brief explanation of how the exemption applies to the records withheld."

14) That the Auditor's December 30, 2011 and February 14, 2012 (pages 27, 40, 122, 137, and 138) productions and related exemption codes comply with RCW 42.56.210(3).

15) The plaintiff did not request, and the Court did not conduct, *in camera* review of other portions of the records produced by the Auditor on December 21, 2011. If plaintiff wishes to raise an issue relating to other portions of the December 21, 2011 production, nothing in this Order prevents him from doing so.

Based on these findings and conclusions, it is hereby ORDERED:

1) The redactions made in the December 30, 2011 production, as updated in the February 14, 2012 production of pages 27, 40, 122, 137, and 138, comply with the Public Records Act.

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1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

2) The codes [1], [2], and [9] used in the December 30, 2011 and February 14, 2012 productions by the Washington State Auditor's Office satisfy RCW 42.56.210(3).

3) The plaintiff has no cause of action under RCW 42.56.550(1) pertaining to a) the December 21, 2011 production of the 351 page ".pdf" file, and b) pages 27, 40, 122, 137, and 138 of the December 30, 2011 and February 14, 2012 productions.

DATED: 3-30-2012

Lisa L Sutton
HONORABLE LISA L. SUTTON

Presented by:
ROBERT M. MCKENNA
Attorney General

Jean Wilkinson
JEAN WILKINSON, WSBA #15503
Senior Counsel
Attorneys for Defendant

Approved as to form
and for entry by:

CHRISTOPHER BAWN, WSBA #13417
Attorney for Plaintiff

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

3 MC PUBLIC 1

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SUPERIOR COURT
THURSTON COUNTY, WA

2012 FEB 15 PM 4:55

BETTY J. GOULD, CLERK

☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: February 14, 2012
Time: 3 p.m.
THE HONORABLE LISA L. SUTTON

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

MIKE HOBBS, Plaintiff, v. STATE OF WASHINGTON, WASHINGTON STATE AUDITOR'S OFFICE, a Washington State Agency, Defendant.	NO. 11-2-02725-0 ORDER RE: DECEMBER ~~21~~ 30, 2011 PRODUCTIONS

THIS MATTER came before the Court on February 14, 2012 after *in camera* review of the productions provided on December 21, and 30, 2011 in response to Plaintiff's attorney's records request. The Court reviewed a copy of the December 21 and 30, 2011 productions that allowed the Court to review the redacted material and the exemption code associated with each redaction; and the list of exemption codes provided by Defendant to plaintiff's attorney on December 30, 2011.

In addition, the Court considered the following:

1. Defendant's Motion in Support of Auditor's Exemption Codes.
2. Declaration of Chris Bawn Re: Index of Records Submitted for In Camera Review.
3. Defendant's Reply Re: In Camera Review and Adequacy of Exemption Codes, and Declaration of Jean Wilkinson in Support thereof and its exhibit.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

4. Declaration of Mary Leider In Support Of Motion To Set Case Scheduling Order and exhibits thereto.

5. Second Declaration of Chris Bawn, dated Feb. 15, 2012

The Court being fully advised in the premises finds and concludes:

~~1) The redactions made in the December 21 and 30, 2011 productions are proper under the statutes and authorities cited in the Auditor's exemption codes [1], [2], and [9]. These redactions comply with the Public Records Act.~~

2) That codes [1], [2], and [9] satisfy the requirement of RCW 42.56.210(3) for a "brief explanation of how the exemption applies to the records withheld."

3) That the Auditor's December 30, 2011 ~~production and related~~ exemption codes comply with RCW 42.56.210(3).

~~4) That based on conclusion 3), the plaintiff has no cause of action under the Public Records Act pertaining to the December 21, 2011 production.~~

~~5) That the Auditor's emails and letters attached to the Declaration of Mary Leider In Support Of Motion To Set Case Scheduling Order, responding to plaintiff's attorney's records request, comply with RCW 42.56.520(2).~~

Based on these findings and conclusions, it is hereby ORDERED:

1) ~~That Plaintiff's claims and prayers for relief IV. 2. and 3. are decided in~~ Defendant's favor, ~~and are hereby dismissed~~ with respect to Defendant's December ~~21 and~~ 30, 2011 productions.

2) ~~That this Order resolves in Defendant's favor items 4.2 and 4.3 in Plaintiff's Amended LR 16 Status Report with respect to the December 21 and 30, 2011 productions.~~

~~3) That this Order resolves in Defendant's favor items 4.4, 4.5, and 4.6 in Plaintiff's Amended LR 16 Status Report.~~

The codes [1], [2], and [9] used by the Wa St. Auditor's office in the 12-30-2011 production satisfy RCW 42.56.210(3).

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

DATED: 2-15-2011

HONORABLE LISA L. SUTTON

Presented by:
ROBERT M. MCKENNA
Attorney General

JEAN WILKINSON, WSBA #15503
Senior Counsel
Attorneys for Defendant

Approved as to form
and for entry by:

CHRISTOPHER BAWN, WSBA #13417
Attorney for Plaintiff

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

16 MC PUBLIC 1

SUPERIOR COURT
THURSTON COUNTY, WA

2012 NOV -9 PM 12: 29

BETTY J. GOULD, CLERK

☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: November 9, 2012
Time: 11:00 a.m.
Honorable Judge Lisa Sutton

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

MIKE HOBBS, Plaintiff, v. STATE OF WASHINGTON, WASHINGTON STATE AUDITOR'S OFFICE, a Washington State Agency, Defendant.	NO. 11-2-02725-0 FINAL ORDER - PUBLIC RECORDS ACT HEARING ON AFFIDAVIT PURSUANT TO RCW 42.56.550(3)

I. INTRODUCTION

This matter came on regularly for hearing on August 17, 2012, before the above-entitled Court pursuant to the Public Records Act, RCW 42.56.550(3). Defendant, Washington State Auditor's Office, appeared and was represented by ROBERT M. McKENNA, Attorney General, JEAN WILKINSON, Senior Counsel, and LINDA A. DALTON, Senior Assistant Attorney General. Plaintiff Mike Hobbs appeared and was represented by CHRISTOPHER W. BAWN, Attorney at Law. The Court heard approximately four and one-half hours of argument on the parties' hearing briefs, the State Auditor's Motion in Limine,

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

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and the parties' requests to strike. The Court gave an oral ruling on September 4, 2012.

In addition to the parties' oral arguments, the Court considered the following pleadings:

1. Defendant's Brief for Public Records Hearing on Affidavit;
2. Declaration of Jean Wilkinson in Support of Auditor's Hearing Brief;
3. Declaration of Mary Leider in Support of Auditor's Hearing Brief;
4. Declaration of Julie Cooper in Support of Auditor's Hearing Brief;
5. Declaration of Kim Hurley in Support of Auditor's Hearing Brief;
6. Declaration of Cheri Elliott in Support of Auditor's Hearing Brief;
7. Declaration of Jan Jutte in Support of Auditor's Hearing Brief;
8. Declaration of Pete Donnell in Support of Auditor's Hearing Brief;
9. Defendant's Motion in Limine re: Mark Rossmiller Opinions and Late Discovery Responses;
10. Declaration of Pete Donnell in Support of Defendant's Motion in Limine;
11. Declaration of Mary Leider in Support of Defendant's Motion in Limine;
12. Declaration of Jean Wilkinson in Support of Motion in Limine;
13. Response to Defendant's Argument Concerning Motions in Limine;
14. Declaration of Christopher W. Bawn Concerning Motions in Limine;
15. Defendant's Reply re: Motion in Limine re: Mark Rossmiller Opinions and Late Discovery Responses;
16. Declaration of Jean Wilkinson re: Motion in Limine Reply;
17. Declaration of Nerissa Raymond;
18. Declaration of Candace Vervair;
19. Trial Brief of Plaintiff;

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1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

20. Declaration of Chris Bawn with Exhibits from Witnesses for Trial;
21. Declaration of Mike Hobbs;
22. Defendant's Reply for Public Records Hearing on Affidavit;
23. Reply Brief Declaration of Jean Wilkinson;
24. Reply Brief Declaration of Mary Leider;
25. Declaration of Marshall Kono in Support of State Auditor's Reply Brief;
26. Reply Brief Declaration of Kim Hurley;
27. Declaration of Chris Bawn dated August 17, 2012.

II. FINDINGS OF FACT

The Court, being fully advised, hereby makes the following Findings of Fact:

1. This case pertains to a public records request ("PRR #1513") submitted to the State Auditor's Office on November 28, 2011 by attorney Christopher Bawn on behalf of Plaintiff Mike Hobbs ("the requestor").
2. The State Auditor timely provided its initial response regarding PRR #1513 on December 5, 2011, advising the requestor that the first installment of records would be available after December 16, 2011.
3. The State Auditor responded to PRR #1513 in installments. The State Auditor delivered the first installment by secure file transfer to the requestor on December 21, 2011.
4. Plaintiff Hobbs filed this lawsuit on December 23, 2011, two days after the delivery of the State Auditor's initial installment in response to PRR #1513.
5. The State Auditor has a Datashare Agreement with the Department of Social and Health Services (DSHS), under which DSHS agrees to provide

records to the State Auditor's Office for audits and investigations. In the Agreement, the State Auditor's Office agrees to notify DSHS of any public records requests that relate to records the State Auditor has obtained from DSHS. The Agreement requires the two agencies to consult with each other regarding DSHS records to redact information that is confidential under applicable laws, prior to the release of DSHS records by the State Auditor's Office.

6. When responding to PRR #1513, the State Auditor exercised care in the redaction of confidential information about foster children from DSHS records. For that reason, the State Auditor consulted with DSHS starting in December 2011, and continued communication with DSHS about how to redact 2,020 pages of DSHS foster child records as those records were prepared for release in January and February 2012. These actions by the State Auditor were reasonable.

7. On December 5 and 30, 2011, the State Auditor sent emails to the requestor, stating that it would be communicating with DSHS about the time DSHS would need to review foster child records, so that the State Auditor could prepare an estimate of time it would take it to completely respond to PRR #1513.

8. By January 6, 2012, the State Auditor had the estimated length of time necessary for DSHS to review the responsive DSHS records and identify the confidential information contained in the DSHS records. On January 6, 2012, the State Auditor sent an email to the requestor providing an estimate of time to produce a complete response to PRR #1513.

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9. The State Auditor acted reasonably in responding and estimating the amount of time to produce all records, once it received adequate information from DSHS. This process allowed production of the first installment while the State Auditor and DSHS conferred to preserve the confidentiality of records as required by law.

10. The State Auditor produced 215 emails in .pst format, a format that provided the metadata for the emails.

11. In emails sent by the State Auditor on January 19, January 27, and February 1, 2012, the State Auditor conferred with the requestor about how to produce the metadata for emails that contained confidential information and therefore required redaction.

12. By a February 7, 2012 email, the requestor agreed that the State Auditor's method of disclosure for emails that needed redaction, as proposed in its February 1, 2012 email – to extract metadata with the use of forensic software – was consistent with his request for metadata.

13. The State Auditor produced 17 versions of the Word document known as the "closing letter" in electronic format on December 21, 2011. After being advised on February 9, 2012 of a potential problem with the metadata produced with the closing letter, the State Auditor reviewed and then on February 27, 2012, the State Auditor updated the December 21, 2011 production with 17 versions of the closing letter with the original metadata.

14. The Court reviewed and considered the testimony of Mark Rossmiller as well as the State Auditor's staff, Pete Donnell. The Court found the testimony of each helpful and, because this is a public records case, the

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Court takes a liberal view of the evidence presented, including Mr. Rossmiller's deposition testimony.

15. Mr. Rossmiller's testimony does not prove that records or their metadata were destroyed. Mr. Rossmiller was not asked to and did not review the State Auditor's subsequent production of the closing letter with the original metadata.

16. There is no evidence that handwritten notes, drafts, or electronic files or folders responsive to PRR #1513 were destroyed after the State Auditor received PRR #1513.

17. The plain language of PRR #1513 does not request a search for disaster plans for backups, tapes, invoice vouchers, employee calendars and calendar entries, files tabs, or timekeeping data.

18. The State Auditor did not interpret the term "correspondence" in PRR #1513 to mean invoice vouchers.

19. The State Auditor could not and did not know until the requestor's clarifications in June and July 2012 that he sought a search of disaster recovery tapes, invoice vouchers, employee calendars and calendar entries, tabs, and timekeeping data. The clarification came during depositions taken in June 2012, and Plaintiff Hobbs' untimely discovery responses provided to the State Auditor in July 2012. At those times, Mr. Hobbs clarified that he was requesting a search of disaster recovery tapes, invoice vouchers, employee calendars and calendar entries, tabs, and timekeeping data. After this clarification, the State Auditor promptly responded and provided records.

20. Disaster recovery tapes are kept by the State Auditor for disaster recovery purposes only, not other business purposes. The content of all files on these tapes is not searchable in the ordinary manner.

21. Absent the later clarification of PRR #1513, the State Auditor completed its response on PRR #1513 on March 1, 2012. Its response included more than 2,300 pages of records that required extensive redactions; and the more than 300 emails that were produced in electronic format, all of which required review for confidential information, and 119 of which required redactions. Three months was a short time to produce these records.

22. The State Auditor communicated often and extensively with the requestor, and sent more than 20 emails and letters to the requestor to clarify and provide time estimates about PRR #1513.

23. The State Auditor provided records in installments as they became ready for production. This included contacting the requestor and reposting a secure file transfer on March 29, 2012, after the requestor failed to download the records prior to the expiration of the secure file transfer.

24. On January 6, 2012, the State Auditor asked the requestor to advise the State Auditor if he believed a mistake had been made in responding to PRR #1513, so that the State Auditor could address the matter if possible. The State Auditor endeavored to work with the requestor and clarify the request.

25. When the State Auditor received PRR #1513 on November 28, 2011, the State Auditor had 24 open public records requests that it continued to process at the same time as PRR #1513. In addition, the State Auditor

received an additional 58 records requests between November 28, 2011 and March 1, 2012 while the State Auditor was responding to PRR #1513.

26. On the date Mr. Hobbs filed this lawsuit, he also served discovery requests on the State Auditor. The State Auditor staff who were working on responses to PRR #1513 also worked on responses to these discovery request during the same time period. The State Auditor responded to Mr. Hobbs' discovery requests on February 1, 2012, and provided supplemental responses on March 16, April 6, June 6, and July 10, 2012.

27. The court's Case Schedule Order directed the parties to identify the issues raised by this lawsuit.

28. The State Auditor conducted discovery. Mr. Hobbs did not timely respond to the State Auditor's Requests for Admissions, or to the first, second, and fourth set of interrogatories and requests for production.

III. CONCLUSIONS OF LAW

Based on the pleadings filed in this matter, the briefing and oral argument presented by the parties, and the above Findings of Fact, the Court makes the following Conclusions of Law:

1. The burden of proof is on the agency to demonstrate compliance with the Public Records Act, in this case, the State Auditor. RCW 42.56.550(1) and (2). The State Auditor has met that burden as to each of the issues raised by Mr. Hobbs and identified as follows.

2. The Court considered all issues raised by Mr. Hobbs in his August 10, 2012 Trial Brief.

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ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

Compliance with RCW 42.56.520 – State Auditor's initial response to PRR #1513

3. RCW 42.56.520 provides, in part, that an agency may comply with the requirement to respond to a public records request within five days by acknowledging receipt of the request and providing a reasonable estimate of time to respond. The facts of each case determine what is "reasonable".

4. RCW 42.56.520 does not expressly state that the agency's estimate of time to respond must be an estimate of the date of the full and complete agency response to the records request. The model rule – WAC 44-14-04003 – is not binding.

5. Some of the records responsive to PRR #1513 were DSHS records containing information relating to foster children that is confidential under state and federal law. RCW 13.50.100; 74.04.060 (stating in part that preservation of confidentiality is a condition of federal funding).

6. Because responsive records contained statutorily protected and confidential information about foster children, it was reasonable for the State Auditor to confer with DSHS about the length of time DSHS needed to review and redact foster child records, prior to providing the requestor an estimated date of the State Auditor's complete response to PRR #1513.

7. The State Auditor complied with state law by continuing to communicate with the requestor that the State Auditor would provide an estimated date of a complete response after it had received sufficient information from DSHS.

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1125 Washington Street SE
PO Box 40100
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(360) 664-9006

8. The Datashare Agreement between the State Auditor and DSHS is consistent with the policy of the Public Records Act and the model rules. *Confederated Tribes v. Johnson,* 135 Wn.2d 734, 758 (1998).

9. The State Auditor complied with the Agreement and state law when it (a) consulted with DSHS about statutorily required redactions to DSHS foster child records; (b) waited to hear back from DSHS prior to redacting and producing DSHS records in response to PRR #1513; and (c) thereafter provided the requestor an estimated date of its complete response to PRR #1513 to the requestor. This process was reasonable and complies with the Public Records Act.

10. The State Auditor's Office December 5, 2011 email to the requestor complied with RCW 42.56.520's requirement to respond to a records request within five days by acknowledging receipt of the request and providing a reasonable estimate of time to respond.

Production of electronic records and metadata

11. The State Auditor did not violate the Public Records Act with respect to the production of emails and their associated metadata when it produced all emails either in .pst format or, for emails containing confidential information, with the metadata extracted and produced separately, a format agreed to by the requestor.

12. The State Auditor did not deny the requestor any responsive email within the meaning of RCW 42.56.550(1).

13. The State Auditor properly and in compliance with the Public Records Act, responded to PRR #1513 in installments.

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1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

14. The State Auditor complied with the Public Records Act when, after producing 17 versions of the Word document known as the "closing letter" in electronic format on December 21, 2011, the State Auditor later, after notified of a problem with the associated metadata, on February 27, 2012 produced an updated version of the closing letter which properly disclosed the documents' original metadata.

15. The State Auditor did not deny the requestor metadata for the 17 versions of the closing letter within the meaning of RCW 42.56.550(1).

16. The State Auditor complied with the Public Records Act for each instance when it updated its production of records, consistent with the Supreme Court's reasoning in *Sanders v. State*, 169 Wn.2d 827 (2010) (the Public Records Act should be interpreted to encourage parties to cooperate to facilitate the production of public records, for example to produce documents for which claims of exemption may fail, or to allow agencies to provide new explanations after the agency's initial response.)

17. The opinion of Mark Rossmiller that the State Auditor had destroyed metadata for the 17 versions of the closing letter is not entitled to weight because Mr. Rossmiller reviewed only the December 21, 2011 production of these records, and did not review the updated February 27, 2012 production.

Adequacy of the State Auditor's search for records identified in PRR #1513

18. Mr. Hobbs' reliance on RCW 40.14 or WAC 434-662-040 has no bearing on the issues raised in this lawsuit under the Public Records Act. Under the Public Records Act, the only retention requirement is for the agency to retain records in existence on the date of the public records request.

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1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

19. Under the Public Records Act, a records request must be for identifiable public records. RCW 42.56.080. Requestors must provide a reasonable description of the records they want, that enables the agency to identify and locate the requested records; an agency is not required to be a mind reader. *Levy v. Snohomish County*, 167 Wn. App. 94, 98 (2012).

20. PRR #1513 did not contain language that would require the State Auditor to interpret PRR #1513's request for "correspondence" to include invoice vouchers.

21. PRR #1513 did not contain language that would require the State Auditor to interpret PRR #1513 as a request to search disaster recovery tapes, or a request for production of employee calendars and calendar entries, file tabs, and timekeeping data. THIS IS A Finding of Fact, not a Conclusion of Law. JW

22. The State Auditor's interpretation of PRR #1513 – that PRR #1513 did not request a search of disaster recovery tapes, invoice vouchers, employee calendars and calendar entries, tabs, and timekeeping data – was reasonable.

23. Mr. Hobbs' requests for these records arising from depositions taken in June 2012 and in discovery responses provided in July 2012, were not encompassed in PRR #1513. These requests constituted a clarification of PRR #1513.

24. The State Auditor reasonably and in compliance with the Public Records Act treated Mr. Hobbs' subsequent requests as a clarification of PRR #1513.

25. The Public Records Act does not contain a *per se* rule that agencies must search disaster recovery tapes for potentially responsive records. These

tapes are kept for disaster recovery purposes, and the content of all files on these tapes is not searchable.

26. In light of the State Auditor's reasonable interpretation of PRR #1513, and the absence of a reasonable description of records such as disaster recovery tapes, invoice vouchers, employee calendars, file folder tabs, and timekeeping data, the State Auditor's search was reasonable and appropriate to meet the requirements of the Public Records Act.

27. The State Auditor did not destroy or fail to produce any responsive records including drafts, handwritten notes, or electronic files or folders and their metadata, responsive to PRR #1513 after the State Auditor received PRR #1513 on November 28, 2011.

28. Mr. Hobbs failed to refute the State Auditor's evidence that its search for responsive records was reasonable, and that any public record in existence on November 28, 2011 was not produced.

29. The State Auditor's repeated and frequent interactions with the requestor to ensure its compliance with the request, as well as to identify any potential mistake that may have been made in an attempt to address each issue, distinguishes this matter from other reported cases in which agencies were not working with the requestor to clarify what the requestor wanted.

30. The State Auditor reasonably interpreted PRR #1513, sought clarification, and timely responded to PRR #1513 through installments.

31. The State Auditor's subsequent production of records after Mr. Hobbs' clarification during discovery also was reasonable and proper under the Public Records Act.

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ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

Request to reconsider March 30, 2012 Order on In Camera Review regarding December 21 and 30, 2011 productions.

32. After considering the briefing and oral argument, the Court declines to reconsider or revise its March 30, 2012 Order on In Camera Review. There was not a denial of records with respect to the December 21 or 30, 2011 productions of records, within the meaning of RCW 42.56.550(1).

IV. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby ORDERS as follows:

1. Mr. Hobbs' request for relief under the Public Records Act as pleaded and argued regarding PRR #1513 is denied and this action dismissed with prejudice because the State Auditor did not violate the Public Records Act. All relief he requests for a statutory penalty, attorneys' fees and costs, interest, and other equitable relief are hereby denied in their entirety.
2. The State Auditor's Motion in Limine relating to the deposition testimony of Mark Rossmiller is denied.
3. The State Auditor's Motion in Limine relating to untimely answers to Requests for Admissions and the Fourth Set of Interrogatories and Requests for Production is denied because, as this is a Public Records Act case, the Court decides it is important to consider all of Mr. Hobbs' objections and arguments.
4. The State Auditor's request to strike legal argument contained on pages 2-7 of the August 13, 2012 Bawn Declaration as untimely filed under the amended Case Scheduling Order, is denied because the Public Records Act intends that public records cases be handled quickly and without protracted

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

litigation, and the Court decides it is important to consider all of Mr. Hobbs' arguments.

5. The State Auditor's request to strike the August 13, 2012 Hobbs Declaration as untimely filed under the amended Case Scheduling Order, is denied because the Public Records Act intends that public records cases be handled quickly and without protracted litigation, and the Court decides it is important to consider all of Mr. Hobbs' arguments and evidence.

6. Mr. Hobbs' oral motion to strike the Reply Declaration of Marshall Kono is denied because the Public Records Act intends that public records cases be handled quickly and without protracted litigation, and the Court decides it is important to consider all of the parties' arguments and evidence.

7. The State Auditor's request to strike the eight complete deposition transcripts attached to the August 13, 2012 Bawn Declaration as violations of court rules, and require Mr. Hobbs to file only the pages of the transcripts actually cited to and relied on by Mr. Hobbs, is denied.

8. The State Auditor is awarded $. 1,991.90 (41) in statutory costs pursuant to RCW 2.84.010 and .030. Denied

DATED this 9 day of November 2012.

HONORABLE LISA SUTTON
Thurston County Superior Court Judge

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

Presented by:
ROBERT M. McKENNA
Attorney General

Jean Wilkinson

JEAN WILKINSON, WSBA #15503
Senior Counsel
LINDA A. DALTON, WSBA #15467
Senior Assistant Attorney General
Attorneys for Respondent

Approved As To Form /s/ JWilk
Notice of Presentation waived:

CHRISTOPHER W. BAWN, WSBA #13417
Attorney for Petitioner

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006