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NO. 44284-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL HOBBS,

Appellant,

v.

STATE OF WASHINGTON, AUDITOR'S OFFICE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In response to Mr. Hobbs' records request, the State Auditor's Office ("Auditor") produced thousands of pages of records, narrowly redacting only as necessary to serve two important privacy interests recognized in state law. The Auditor promptly notified Hobbs that it would produce the records in installments, as authorized by the Public Records Act ("PRA"). Nevertheless, Hobbs filed this lawsuit two days after receiving the first installment, claiming he was denied records even though he had received notice from the Auditor that it was still processing records for his request.

As part of its ongoing production of records, the Auditor conducted diligent searches for the requested records, provided Hobbs with reasonable estimates of dates it would deliver installments, quickly resolved each complaint he raised, and explained each redaction by reference to valid and applicable statutory exemptions.

Like the superior court, this Court should reject Hobbs' attempt to use the PRA to collect a monetary penalty by rushing to file litigation after delivery of only one installment, and without having clearly identified to the Auditor all of the records he wanted. Hobbs' interpretations do not reflect or serve the PRA's intended purpose—that agencies promptly disclose public records to the citizens of the State. The superior court's order denying relief to Hobbs should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

A. When the Auditor produced records by the installment method, did the superior court correctly base its decision that the Auditor fully complied with the PRA on the entire production, including the final installment of records produced by the Auditor?

B. Did the Auditor comply with the PRA's requirement to explain exemptions from disclosure by using an approach designed to increase speed and efficiency of its response, which numbers each redaction and provides a corresponding list providing brief explanations and citing exemption statutes?

C. RCW 42.56.520 allows for an agency to respond to a records request by providing an estimate of time the records will be made available. Was the procedure the Auditor used in giving estimated dates for the next records installment in compliance with the law?

D. Did the Auditor and the superior court correctly interpret Hobbs' records request as not including certain records, and did the superior court correctly conclude the Auditor had complied with the PRA when it treated Hobbs' deposition testimony as a clarification of his request and thereupon produced the records?

III. COUNTERSTATEMENT OF THE CASE

A. The Auditor's Responses to Mr. Hobbs' Records Request

1. Mr. Hobbs' Records Request.

On November 28, 2011, the Auditor received a public records request from Hobbs' counsel, Christopher Bawn, on behalf of a client.[1] CP 261-62. Hobbs requested records related to a whistleblower

[1] In the remainder of this brief, the records request and all communications with Mr. Bawn as counsel for Hobbs are referred to by reference to Hobbs.

investigation conducted by the Auditor. That investigation was prompted by a complaint concerning how Department of Social and Health Services (DSHS) employees handled Social Security dedicated accounts for foster children. CP 249. The investigation (Whistleblower Case 10-005) had recently been completed with a "closing letter" dated November 17, 2011. *Id.* Hobbs' request asked that electronic records be produced in electronic format with metadata. CP 261.

In the course of the investigation, DSHS provided the Auditor copies of records from its foster children files. CP 251. These records are protected from public dissemination by state and federal confidentiality laws. CP 251, CP 287-88 (Appendix A). To ensure compliance with these confidentiality laws—and prior to this records request—the Auditor and DSHS had entered into a datashare agreement under which DSHS agreed to provide confidential information to the Auditor for its investigations and assist the Auditor in responding to public records requests by reviewing a copy of the responsive records and notifying the Auditor of redactions DSHS considered necessary to comply with confidentiality laws. CP 313-14, 318-22.

2. The Auditor's First Response and Installment.

Auditor public records officer Mary Leider responded within five working days of receipt of Hobbs' request, estimating that a first installment of records would be ready on December 16, 2011. CP 267. Ms. Leider also provided Hobbs options for his inspection or receipt of a copy of the records, explained the steps the Auditor would follow in processing records relating to confidential information about foster children, advised Hobbs that the Auditor could not yet give a firm estimate of the time needed for DSHS to review of foster child records pursuant to the datashare agreement, and welcomed further questions. *Id.*

Hobbs did not respond until December 20, 2011, when he contacted Leider to obtain the first installment of records. CP 270. The following morning by return email, Leider sent Hobbs secure file transfer links containing the first installment of responsive records (the December 21, 2011, installment). CP 269. One record included was a copy of 17 electronic versions of the November 17, 2011 "closing letter" for investigation 10-005. CP 256-57. The other record was 351 pages from the Auditor's whistleblower investigation file 10-005. CP 255. This second record had to be scanned into an electronic (PDF) format to facilitate redaction and production to Hobbs. CP 250.

To explain the redactions made to the 351-page record, the Auditor marked each redaction with the applicable statutory exemption and a link to a list of exemption codes that relate to RCW 42.40.040(2), the whistleblower confidentiality statute. CP 269.[2] At the time she delivered the first installment on December 21, Leider informed Hobbs that she would contact him the following week to provide him an estimated date for the next installment of records. CP 269.[3]

3. Records Act Lawsuit Initiated.

On December 23, 2011, two days following transmittal of the first installment, Hobbs initiated this lawsuit seeking remedies under the PRA. His Complaint alleged the Auditor did not correctly redact the records it produced, did not provide adequate explanations for redactions, and did not provide an adequate estimate of time for responding to the request, among other claims. CP 11-27.

4. Second Installment of Records.

On December 30, 2011, Leider sent two emails to Hobbs. First, she informed Hobbs that the next installment of records would be ready on January 13, 2012, and that the Auditor was preparing yet another installment consisting of foster children records which contained personally identifiable information in need of redaction. CP 276.

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[2] Hobbs makes inconsistent arguments about the exemption list in the December 21, 2011 installment. *Compare, e.g.*, Br. App. at 16 (arguing that no explanation for redactions was provided on that date) with Br. App. at 14 (admitting this exemption list was provided). This brief uses the abbreviation "Br. App." when referencing Hobbs' Brief of Appellant.

[3] Ms. Leider was out of her office from December 21-27, 2011. CP 270.

In a separate email that day, Leider transmitted a second installment (the December 30, 2011, installment), containing a replacement set of records for one of the records – the 351-page investigation file – produced in the first installment. CP 277. Leider explained, "I am sending you updated versions which use code numbers instead of RCW numbers to explain redactions." *Id.* She also enclosed a document providing code numbers to correspond with the codes used for the redactions in the December 30, 2011, installment 1, together with statutory citations and the explanation of how the exemptions in those statutes apply to each redaction. CP 278 (Appendix A). This updated explanatory list is the same list provided with the first installment, except that it added one additional code and description (code "[9]"). *Compare* CP 278 *with* Exhibit B (Exhibit C Disk1).[4]

5. The Auditor's System of Redactions.

To enhance the speed and efficiency of its public records responses, the Auditor used redaction software and an exemption coding system that enabled the Auditor to "black out" exempt information and then superimposed text over each "blacked-out" box. *See e.g.* CP 685-89. In the December 21, 2011, installment, the Auditor superimposed the

[4] Exhibits A and B are CDs submitted to the superior court. Exhibit B is a CD submitted by Hobbs containing two files which are labelled Exhibit C Disk1 and Exhibit H Disk2.

applicable statutory exemption. *See e.g.* CP 46. Once Hobbs filed his lawsuit the Auditor learned that technical problems prevented Hobbs from seeing portions of the statutory citations. CP 16. In the December 30, 2011, installment the Auditor instead superimposed over each "blacked-out" box a numerical code. Each code number corresponds to a numbered list that describes the information redacted and cites the specific statutory exemptions that apply to that information. CP 278.

In all installments starting with the December 30, 2011 installment, the Auditor superimposed an exemption code number on redactions it made to records. Exhibit A, CP 685-89. In the December 30, 2011, installment, for example, the Auditor used two different codes citing RCW 42.40.040(2), each briefly explaining how the redacted information related to the identity of a whistleblower or of a witness in a whistleblower investigation. CP 278, codes [1] and [2]. For its response to Hobbs' request, the Auditor also developed eleven distinct codes and brief explanations for various redactions it made to withhold confidential foster child information. CP 287-88, codes [9] through [19].[5]

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[5] For example, Code [9] describes the redacted information as 'names of foster children obtained from files and records maintained by DSHS..." and cites several statutes as exempting that information.

6. The Auditor's Records Search.

Auditor staff met on numerous occasions to discuss Hobbs' request. CP 313. They discussed how to interpret the request, where to search for records, what terms to use in those searches, and the process for collecting, redacting, and producing records. CP 313. In addition to redacting and preparing the investigation file 10-005 (which included the 351-page record discussed above and 2,020 pages copied from DSHS foster child records), staff conducted searches of the Auditor's computer network, vaulted emails, individual staff Outlook emailboxes, the computer hard drives of four employees, the hard drives of laptops used by the Whistleblower staff, and the Auditor's Sharepoint system (software that provides multiple users access to shared documents). CP 243-44, 246, 250-52, 255-59, 314-15, 324-26. The Auditor used approximately 30 different search terms when searching electronic email records. CP 257.

7. The Auditor's Ongoing Communications With Mr. Hobbs and Production of Installments.

Auditor staff corresponded frequently with Hobbs in January and February 2012 to provide him continuing information about how it was processing future installments of records and timing of productions. CP 279-81, 284, 289-90, 292. Leider sent Hobbs 20 separate emails and letters between December 5, 2011, and March 29, 2012, regarding his records request. CP 255. In addition to the records delivered on December 21 and 30, 2011, the Auditor delivered installments on January 12; February 1, 13, 14, 16, 17, and 16; and March 1 and 29, 2012. CP 280, 285-88, 290-94, 299-302.

On January 6, 2012, Leider notified Hobbs that she estimated the remaining responsive records would be provided by February 13, 2012. CP 279. However, while it was processing email metadata, a technical issue arose regarding redaction. CP 281. Leider conferred with Hobbs regarding this issue, they agreed on a method of production (CP 258, 282-89), and the remaining records were produced on March 1, 2012. CP 299.

During its ongoing production of records to Hobbs, Ms. Leider on her own initiative monitored the Auditor's progress. For example, she re-produced one installment because she noticed technical difficulties on some of the pages of the February 16, 2012 production. CP 293. Similarly, after Leider noticed several weeks later that Hobbs had failed to download the March 1, 2012, installment from the secure file transfer, Ms. Leider re-produced the records to him because the secure file transfer had expired. CP 302.

8. Mr. Hobbs' June 2012 Clarification of His Request.

When the Auditor produced the final installment of records to Hobbs on March 1, 2012, Leider sent an email stating "[w]e believe we have now provided all the responsive documents to fulfill your request ... Please contact us if you think there are problems with our response, so that we may address your concerns." CP 301. Hobbs did not respond.

During the course of discovery in Hobbs' lawsuit, he deposed several Auditor employees, and personally attended each deposition. CP 742, 969, 1016, 1095, 1168. Later, Hobbs referred to these depositions in his own deposition, on June 21-22, 2012, to claim that records that fell within the scope of his request had not been produced. CP 351-52, 357-58, 362-63.[6]

The Auditor did not read Hobbs' original records request as having identified the additional records he referenced in his deposition. CP 312, 691, 693. Nevertheless, the Auditor treated his deposition testimony as a clarification of his November 28, 2011, records request, and commenced a search for the newly identified records. CP 312 ¶ 5, 316-17. The Auditor produced additional records in two installments, unredacted records on July 18, 2012, and redacted records on August 2, 2012. CP 691, 693. The Auditor did not concede that Hobbs' original request included these records. CP 384, 691, 693.

During his deposition, Hobbs testified that he had not reviewed all the records produced by the Auditor in response to his request. CP 1279.

[6] As set forth more fully at III.F.2. *infra*, Hobbs claimed that his request included such items as invoices, time logs, and all calendars.

When asked if he intended to review all the produced records, Hobbs stated, "I don't know why I would go back and look at those records." CP 1282. When questioned about the remedy he sought, he testified that what he wanted was a "big enough fine or settlement." CP 1281.

B. Procedural History of Mr. Hobbs' PRA Lawsuit

1. *In Camera* Review of First Installment.

Soon after his Complaint was filed, the superior court granted Hobbs' request for *in camera* review of the installment delivered on December 21, 2011. CP 40-42; Exhibits A and B. Hobbs argued the installment violated the PRA because it provided only citations to statutes, allegedly redacted material that was not exempt, and because some of the citations were incomplete or missing. CP 100-18, 132-35, 153-58; Exhibit B (Exhibit C Disk1). Hobbs did not challenge the validity of statutory exemptions the Auditor cited, but only the size of the redactions and how each redaction was explained. *Id.*

In response, the Auditor argued that production was ongoing and the superior court should base any ruling on PRA compliance on the full production, including the December 30, 2011, and subsequent installments of records. CP 123-30, 143 -52; Exhibit A. Starting with the December 30, 2011, installment, as explained above, the Auditor superimposed the redactions with exemption codes instead of citations to statute and addressed the technical problem that had occurred with some of the black redaction boxes. CP 49-55, 123-30, 143-51.

Hobbs' pleadings below asserted that 15 pages in the 351-page record had not been correctly redacted or explained. CP 90, 101. The Auditor reviewed those 15 pages while the superior court was conducting *in camera* review (CP 291), updated the redactions on four of the pages to reduce the size of the "black box," and reproduced those four pages to Hobbs on February 14, 2012.[7] CP 684-89.

Hobbs also asserted that copies of electronic Word documents produced on December 21, 2011, contained altered, rather than original, metadata. CP 102. Once apprised of Hobbs' concern, Auditor staff reviewed the records produced and determined that while copying these documents for production, Auditor staff had not made an accurate copy of the metadata. CP 324 ¶ 6 – 325 ¶ 8. The Auditor staff then promptly recopied these documents using the correct copying method, and produced them to Hobbs on February 27, 2012. CP 404-15, 1364-65, 1370.

While the superior court was conducting *in camera* review, the Auditor filed a motion seeking a ruling on the adequacy of its exemption codes and the brief explanations related to each code. CP 49-55. On

[7] In addition, the Auditor updated its production of page 122, which contained three black boxes. In the December 30, 2011, installment, two of the black boxes had been superimposed with exemption code [9], and on the updated production of this page, all three black boxes were superimposed with exemption code [9]. CP 169.

February 15, 2012, the superior court ruled that the Auditor's exemption codes [1], [2], and [9] were adequate "brief explanations" of exemptions to satisfy the PRA requirement that an agency provide a brief explanation for redactions. CP 138-40, 188.[8]

The superior court ruled in the Auditor's favor on the remaining issues raised during the *in camera* review in a written order entered on March 30, 2012. CP 172-75, 185-90. The court ruled that the installments on December 30, 2011, February 14, 2012, and February 27, 2012, were all proper bases for its *in camera* review, because the Auditor was still responding in installments to Hobbs' request. CP 187-88. The court concluded the redactions in the December 30, 2011, installment of the 351-page investigation file, as updated on February 14, 2012, complied with the PRA. CP 188-89.

2. The Superior Court Hearing.

The superior court conducted a hearing on August 17, 2012, after reviewing the parties' hearing briefs and declarations. CP 1360. The hearing was limited[9] to the following issues raised by Hobbs: whether the Auditor complied with the requirement to provide reasonable estimates of

[8] The superior court reiterated this determination in its March 30, 2012, order. CP 188. Neither order addresses any other exemption code, because Hobbs did not challenge any redactions other than those in the 351-page investigation file.

[9] Thurston County Superior Court, Local Rule 16(c)(1)(A)(i), requires parties to identify the issues in a PRA lawsuit.

time it would take to respond; whether the Auditor produced the requested electronic records and metadata; the adequacy of the Auditor's search for records; whether the Auditor properly explained redactions; and yet another request for the court to address whether the Auditor redacted non-exempt material in it production of the 351-page investigation file. CP 1360-73.

Other than the Auditor's redactions made to the 351-page investigation file, Hobbs did not challenge any other redactions for which the Auditor asserted an exemption, nor did he challenge the validity or applicability of the statutory exemptions the Auditor cited.

On November 9, 2012, the superior court entered findings of fact and conclusions of law, and issued an order denying Hobbs relief on all issues he raised. CP 1360-75.

IV. STANDARD OF REVIEW

Agency action challenged under the PRA is reviewed *de novo*. *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 428, 300 P.3d 376 (2013). Appellate courts stand in the same position as superior courts when the record consists only of affidavits, memoranda of law, and other documentary evidence. *Germau v. Mason County,* 166 Wn. App. 789, 802, 271 P.3d 932 (2012). A superior court's decision to dismiss will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof. *Bock v. State*, 91 Wn.2d 94, 95, 586 P.2d 1173 (1978).

Under the circumstances of this case, the superior court was in an excellent position to assess the Auditor's efforts to fully comply with the PRA, given that the Auditor was simultaneously producing installments of records to Hobbs and appearing frequently in court.[10] The superior court observed first-hand the Auditor's efforts to be fully responsive to Hobbs, to provide helpful explanations of redactions, and to produce accurate copies of records and narrow redactions. As set forth below, this court should affirm. The superior court correctly interpreted the law in light of the PRA's policies, and correctly applied the law to the facts in the declarations submitted by the parties.

V. ARGUMENT

A. The Auditor Properly Used the Installment Method in Responding to Mr. Hobbs' Records Requests

1. The PRA Expressly Authorizes Production of Responsive Records in Installments.

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[10] Between January 20, 2012 and March 29, 2012, while the Auditor continued to produce installments of records to Hobbs, the parties appeared in court seven times to address Hobbs' challenges to the December 21, 2011 installment. Second Amended Statement of Arrangements at 2-3.

The Auditor acted in strict compliance with RCW 42.56.520[11] when it responded to Hobbs within five days and informed him that it would respond to his request with installments of records. The court correctly declined to rule that the Auditor "denied" records based on the manner it redacted the records delivered on December 21, 2011, given that the Auditor continued to prepare records and deliver them to Hobbs through March 29, 2012. CP 187.

A plain reading of two PRA sections supports this result. RCW 42.56.550(1) provides a cause of action to a person "denied" an opportunity to inspect a record. RCW 42.56.080 permits agencies to produce records in installments. Giving effect to RCW 42.56.080, the superior court reasoned that for the period of time it took the Auditor to locate, redact, and produce records in installments, the agency had not "denied" the requester inspection of the records. This interpretation is consistent with the rule that statutes are to be construed so that all parts are given meaning. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). Moreover, courts avoid statutory constructions

[11] RCW 42.56.520 permits an agency to respond to a request within five business days by "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[.] . . . Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request."

that yield unlikely, absurd, or strained consequences. *Kilian v. Atkinson,* 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Hobbs' proffered interpretation – that each installment may be the immediate subject of a PRA lawsuit – is a strained and unreasonable interpretation, because it discourages any use of the installment method.

A requestor benefits from an agency providing records as they are available, instead of delaying until all responsive records are accumulated, reviewed, redacted as necessary and then produced. Because the Auditor prepared records in installments, records were available to Hobbs in as little as three weeks. Had the Auditor provided the records in one production, he would not have received any records until March 2012.

In reaching its correct interpretation of the PRA, the superior court followed the supreme court's admonition against "penaliz[ing] agencies that cooperate with PRA litigants," citing *Sanders v. State,* 169 Wn.2d 827, 849, 240 P.3d 120 (2010). Unlike this case, in *Sanders* the agency had completed its response to a records request, producing certain records and withholding others. 169 Wn.2d at 836. One year later, Sanders filed a PRA lawsuit. After the lawsuit was filed, the agency produced some of the records it had previously withheld. The court refused to hold that the subsequent production made the original withholding of the records a PRA violation. The court reasoned that when an agency updates its initial production and provides more disclosure, "we [do not] believe that production of documents after the requester files suit ipso facto admits the initial withholding was wrongful". *Id.* at 849. The Court explained that such a holding would reduce the incentive to produce records and that agencies should be encouraged to cooperate with requesters to increase access to government records. *Id.*

None of the cases relied on by Hobbs (Br. App. at 26-31) involve the fact pattern present in this case: an agency timely notifying the requester that it would provide records in installments, a PRA lawsuit filed immediately after the first installment to contest that installment, the agency refining its production of records as it continued to provide installments, and the agency completing its response within a reasonable time. For instance, Hobbs cites *Soter v. Cowles Publishing,* 162 Wn.2d 716, 754-56, 174 P.3d 60 (2007), to argue that the PRA favors "quick lawsuits." Br. App. at 36. This passage from *Soter* pertains to a lawsuit initiated by an agency in an attempt to avoid PRA liability where the agency has decided to claim an exemption.[12] *Soter* provides no support for a "quick lawsuit" challenging the adequacy of an agency's response when

[12] In *Soter*, after the agency finished compiling responsive records, it did not produce them; instead, it notified a third party and then together with the third party filed a lawsuit seeking a declaration that the records were exempt. 162 Wn.2d at 727-28. The court held the records were exempt. *Id.* at 749.

the agency is fully and expeditiously engaged in the process of responding, and has kept the requester well-apprised of its progress.

The Auditor does not, as Hobbs argues, attempt to shift the burden of compliance onto the requester.[13] It simply means agencies have the opportunity in installment production to review previous installments to address concerns expressed by a requester, or – as also happened here – to identify, on the agency's own initiative, ways to improve previous productions. *See* CP 293, 303.

2. Production of Records in Installments Promotes the Policies of the PRA.

Strong policy reasons exist for the PRA's authorization for production of records in installments. It encourages PRA requesters to communicate with agencies instead of involving the superior courts and promotes faster and more efficient responses to requests. Consistent with the mandate to provide the "fullest assistance" to requesters, RCW 42.56.100, the Auditor invited Hobbs' questions and concerns (CP 121-22, 269, 301), and quickly responded to them, resolving technical glitches not only when Hobbs identified them, but on its own initiative when it noticed them. CP 293, 303. The PRA should not be construed as Hobbs would have it, *i.e.,* that requesters who do not raise questions or issues to or

[13] Br. App. at 17, citing CP 1342, which is not legal authority but a declaration filed by Hobbs' counsel stating his own opinion.

confer with an agency to assist the agency while it is fulfilling the request may claim the agency has denied a record before the agency has completed its response.

To serve the policy of the PRA, agencies should be encouraged to search for, redact if necessary, and provide records as soon as the agency is able. *See* RCW 42.56.080 (agencies shall make public records "promptly available"). An agency that quickly provides partial records in an early installment serves that purpose, where it knows that additional information can be produced in a later installment once the records have been fully processed. If agencies are penalized in such a situation, as Hobbs argues for, a prudent agency will wait until the records are fully processed before producing them, thus reducing responsiveness rather than encouraging it.

This Court should reject Hobbs' argument (Br. App. at 30) that it is "fortunate" for agencies when requesters rush to the courthouse to file a lawsuit while the agency is in the process of providing installments. It is not "fortunate" for the agency that must defend a premature lawsuit claiming a denial of a PRA request before the agency has had a reasonable opportunity to complete its response to a request. Here, notwithstanding Hobbs' rush to court, the Auditor continued to produce installments through March 29, 2012. Under these circumstances, the superior court correctly concluded Hobbs was not "denied" the "opportunity to inspect records" within the meaning of RCW 42.56.550(1) on December 21, 2011. This Court should affirm.

B. The Auditor's Brief Explanations of Its Redactions Satisfy PRA Requirements

RCW 42.56.210(3) requires that agencies provide a "brief explanation of how the exemption applies to the records withheld." The superior court correctly ruled that this requirement was satisfied by the Auditor's system for providing brief explanations, which used a series of numbered "exemption" codes that correlate each redaction to a specific brief explanation.

The court's ruling is well supported by the case law interpreting RCW 42.56.210(3). In *Sanders*, for example, the agency claimed information was exempt as either attorney client privileged or work product and provided the record's author, recipient, date, and broad subject matter. However, because the agency index was "devoid of any explanation" of how the claimed exemption applied to the record, there was a "failure to explain" the claimed exemption. 169 Wn.2d at 845-46.

In *Rental Housing Ass'n of Puget Sound v. Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009), the court held that the PRA requires agencies to provide sufficient explanation to inform a citizen and a reviewing court 1) what individual records are being withheld; 2) which exemptions are being claimed for individual records; and 3) whether there is a valid basis for a claimed exemption. 165 Wn.2d at 540.

Here, unlike the agencies in *Sanders* and *Rental Housing*, the Auditor's codes provided a brief explanation why each redaction was made and referenced the statutory exemption authorizing the redaction. CP 287-88. Each code applies to a specific type of information that is exempted from production under the PRA. Superimposing the appropriate code on the "blacked out" redaction allows the requester to quickly refer to the explanation and statutory authority for each redaction on an accompanying explanatory list.

The Auditor's codes sufficiently explain the redacted material and why the cited exemption applies. For example, codes [1], [2], and [3] refer to a statutory exemption – RCW 42.40.040(2)[14] – and explain how that statute exempts the redacted information, by stating three different ways the redacted information would reveal the identity of the whistleblower:

> [1] Whistleblower name, contact information (e.g. phone number, address, email address), position and/or agency name that would reveal the identity of a whistleblower.

[14] RCW 42.40.040(2) states: "[t]he identity or identifying characteristics of a whistleblower is confidential at all times ... In addition, the identity or identifying characteristics of any person who in good faith provides information in an investigation under this section is confidential at all times..."

> [2] Information in the description of events related to the alleged improper governmental action that is specific enough to reveal the identity of a whistleblower.
>
> [3] Information provided by the whistleblower relating to the location of evidence that is specific enough to reveal the identity of a whistleblower.

CP 287. These codes briefly describe the type of information that has been redacted, and provide the requester and any reviewing court a basis for understanding the reason why the redacted information would be exempt.[15] Similarly, codes [9] through [19] are specific to different types of information redacted from the DSHS foster child records. CP 287-88.

Hobbs claims the Auditor's exemption list is "generic" and was created in 2010. Br. App. at 1. Even if the claim were true, he cites no authority that interprets the PRA to mandate that the "brief" explanation be more detailed or specific than those provided by the Auditor. Neither the PRA nor case law prohibits an agency from preparing descriptions of specific types of exempt information that occur repetitively in its records to make the public disclosure process more efficient when those records are requested. The test under *Sanders* and *Rental Housing, supra,* is

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[15] As noted above, only exemption codes [1], [2], and [9] were used in the first installment, the only installment Hobbs challenged below. The superior court ruled that the explanations for those codes were statutorily sufficient and that this type of coding system is an acceptable means of providing the required brief explanations. CP 138-40, 185-90.

whether the agency has provided a brief explanation for each redaction. The Auditor's codes do just that.

Hobbs fails to explain why he thinks using such a list shifts any burden to the requester. Br. App. at 34. This method for explaining redactions is not confusing; the requester need only refer to the code numbers actually used, and may disregard any other codes. When, as here, the production of records requires hundreds of redactions to isolated words or sentences, this approach allows the Auditor to more quickly process and produce records, while providing the statutorily required brief explanation for each redaction.

Finally, Hobbs may be arguing that an agency must produce an exemption log with the records produced. *Compare* Br. App. at 4 *with* Br. App. at 28. While an exemption log is one means of complying with RCW 42.56.210(3), it is not the only means. The court in *Rental Housing,* 165 Wn.2d. at 539, referred to a privilege log as an "illustration of compliance," and approvingly cited WAC 44-14-04004(4)(b)(ii) which states, in part, that *"[o]ne way* to properly provide a brief explanation of the ... redaction is for the agency to provide a withholding index..." (emphasis added).[16] A requirement to provide a log listing all records and to draft unique explanations for each redaction is unnecessary to explain

[16] Hobbs tacitly acknowledges that a log is not mandated when he states a log is just "one" method to explain exemptions (Br. App. at 28).

redactions. It would slow down production of records in the circumstances present in this case, and therefore would not serve the purposes of the PRA.

C. The Superior Court Correctly Ruled the Auditor's First Installment, as Updated in Later Installments, Fully Complied with PRA Requirements

At the superior court, Hobbs challenged the redactions made to only one part of one installment, the 351-page investigation file produced on December 21, 2011. Based on its interpretation of the statutorily authorized installment method, the superior court did not limit its review to that installment. Rather, as set forth in section III.B.1. *supra,* the superior court's *in camera* review also considered and ultimately ruled on, installments produced on December 30, 2011, February 14, 2012, and February 27, 2012, which corrected technical glitches and provided better explanations and narrower redactions than the December 21, 2011, installment. This Court should affirm.

1. Redactions to the 351-page Investigation File Were Supported by Valid Exemptions from Disclosure.

The Auditor superimposed hundreds of "black boxes" on its 351-page investigation file, redacting small amounts of text. Starting with the December 30, 2011, installment, each redaction in this record was superimposed with a code number. CP 277; Exhibit A. These numbers corresponded to brief explanations provided in the Auditor's list of exemption codes. CP 278. After reviewing *in camera* unredacted and redacted versions of this record, the superior court found no redaction errors that would violate the PRA. CP 187-88.

The Auditor prepared this record precisely the way courts have directed – it redacted small amounts of information from individual documents. *See Resident Action Council v. Seattle Housing Authority* 177 Wn.2d 417, 433, 437, 300 P.3d 376 (2013) (when an exemption applies only to certain information, an agency should redact exempt information; thereafter "some modicum of information remains").

Hobbs assigns error to the superior court's finding that the redactions to the 351-page investigation file were consistent with the PRA (CP 188), but he makes only two unsupported and limited arguments to support that assignment. Assignments of error must be supported by argument, or they are waived. *Guardianship of Lamb*, 173 Wn.2d 173, 183 n.8, 265 P.3d 876 (2011). First, Hobbs argues the superior court did not consider all pages he identified in his request. Br. App. at 16. But the lower court stated it reviewed all documents submitted for *in camera* review. CP 172. The superior court reviewed all of Hobbs' citations and argument, but disagreed with him.

The only other argument Hobbs makes is that the Auditor erroneously redacted a name of a DSHS employee. Br. App. at 32. Hobbs does not support this argument with a citation to the record. He may have intended to refer to pages 30-31 of the *in camera* documents, a portion of the complaint filed by a whistleblower with the Auditor. CP 101; Exhibit B (Exhibit H Disk2). This redaction was superimposed with code [2], which stated it was redacted because that mention of a DSHS employee in the description of events was specific enough to reveal the identity of the whistleblower.

In summary, Hobbs fails to support this assignment of error with sufficient argument or citation to the record, and it should be rejected.

2. The Auditor Produced Accurate Electronic Copies and Metadata of all Versions of the Investigation Closing Letter.

The superior court similarly found that the Auditor complied with the PRA in its production of the other documents included in the first installment, 17 versions of a Word document known as the "closing letter." CP 1370 ¶¶ 14-15. The superior court found the Auditor, when notified of Hobbs' concern about the metadata in these documents, had promptly provided a new and accurate copy of the metadata, and the Auditor's technical error in how it originally printed the 17 versions does not constitute a PRA violation.

Hobbs requested that electronic records be produced to him in an electronic format that includes metadata. CP 266. In response, the Auditor produced on December 21, 2011, electronic copies of the 17 versions of the closing letter that existed at the time of the request. CP 269, 325, 405-15. In February 2012, Hobbs complained for the first time that the copies of the versions the Auditor provided him contained altered metadata. CP 102. The Auditor quickly reviewed the copies that were produced on December 21, 2011, determined an error had been made during copying, made new electronic copies (CP 324-25 ¶¶6-8), and produced them to Hobbs on February 27, 2012. CP 256 ¶9. The superior court concluded the Auditor's copying error, which was identified and corrected during the time the agency was still responding to Hobbs' request, was not a PRA violation. CP 1370.

In addition, copying metadata is a technical issue. The Attorney General's model PRA rules suggest that requesters and agencies confer about technical issues. WAC 44-14-05003. If requesters do not confer with agencies to address technical copying or production issues, agencies risk instant liability for any error in copying minute details of metadata. An agency subject to such liability necessarily must proceed more carefully—and more slowly—to protect against error. The PRA's policy of prompt disclosure is better served when requesters take simple and reasonable measures to contact the agency to resolve technical issues, rather than seeking judicial intervention and a penalty for a copying error.

The superior court properly rejected Hobbs' argument that the metadata for these records had been destroyed or permanently altered, because the evidence and subsequent productions of the 17 versions did not support such a conclusion. CP 1364-65, 1370. Hobbs' argument relied solely on the deposition testimony of his computer consultant who had seen only the original December 21, 2011, version of these documents. CP 406. Hobbs did not provide his consultant a copy of the Auditor's February 27, 2012, production of these records with the metadata accurately displayed. *Id.* The Auditor's staff forensic auditor testified that he was able to make correct copies of the 17 records with their original metadata. *Id.* The superior court correctly concluded Hobbs' consultant had not seen all pertinent productions, and accordingly, gave his testimony no weight. CP 1370.

As the court below did, this Court should reject Hobbs' argument.

D. The Court Should Reject Mr. Hobbs' Additional Arguments Pertaining to the December 21, 2011, Installment

Because the use of installments to respond to records requests is proper under the PRA, this Court need not and should not address Hobbs' additional arguments that the Auditor's December 21, 2011, installment failed to comply with PRA requirements. If this court decides to address these arguments, it should reject them for the reasons below.

1. The Auditor Made Limited Changes to Redactions in the December 21, 2011, Installment.

Citing nothing but his own argument below, Hobbs alleges that the Auditor erroneously redacted entire pages of records produced. Br. App. at 14, 32, citing CP 101. The superior court made no such finding. If this Court conducts its own review of Exhibit B (Exhibit C Disk 1), it will see that no entire page was redacted in the December 21, 2011, installment.

During the superior court's *in camera* review, Hobbs specified 15 pages he believed had been incorrectly redacted on December 21, 2011. He now seems to argue that the superior court found redaction errors on those pages, and allowed the Auditor to correct the alleged errors. Br. App. at 16, 31-32, citing CP 174. To the contrary, nothing in the superior court's orders addressed the validity of the redactions in the December 21, 2011, installment.

Rather, the superior court limited its order to a ruling that the Auditor's redactions were valid exemptions after the Auditor modified its redactions to reduce the size of black boxes on four pages. CP 186, ¶ 3. In any event, the modifications the Auditor made to two of these pages were minor. The original version of the page 27 redaction blacked out a postmark and a portion of a stamp (Br. App. at 32, CP 47), but the size of this redaction was reduced in the February 14, 2012, installment to show the stamp and postmark. CP 186, 686. The February 14, 2012, installment's update to page 22 reduced the black redaction box to reveal the words "home or mailing address" CP 685.

With respect to two other pages the Auditor reproduced on February 14, 2012, the Auditor was able to reduce the size of redactions because by that date Auditor staff had a better understanding, through its ongoing discussions with DSHS staff, that narrower redactions would be sufficient to protect foster child identities. *See* CP 251, 256, 314. Therefore, on the two other pages (137 and 138) modified for purposes of the February 14, 2012 installment, the Auditor reduced the size of redactions to redact only the names of foster children, rather than descriptions of foster child evaluations CP 688-89.

All the redactions the Auditor made in its December 21, 2011, installment were appropriately narrow. That the Auditor found a way to reduce the size of the black redaction boxes on four pages out of hundreds of redactions in the 351-page investigation record, while still honoring the pertinent statutory exemptions, does not equate to PRA liability.

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2. The Auditor Cited Applicable Statutory Exemptions in the December 21, 2011, Installment and Quickly Addressed Technical Problems.

In its December 21, 2011 production of the 351-page investigation file, the Auditor superimposed each black redaction box with one of two statutory exemptions, RCW 42.40.040(2) or RCW 13.50.100. Exhibit B (Exhibit C Disk1). As explained above, RCW 42.40.040(2) exempts the identity of a whistleblower. RCW 13.50.100 pertains to juvenile justice care agencies and provides this exemption: "(2) Records covered by this section shall be confidential and shall be released only pursuant to this section and RCW 13.50.100."

As to Hobbs' argument that some of the redactions contained no statutory reference (Br. App. at 4), many of the black boxes in the December 21, 2011 installment contain a full citation to a statutory exemption. *See, e.g.,* Exhibit B (Exhibit C Disk1, pages 113, 120). Only a portion of the black boxes contain a partial RCW number. For example, page 94 is an email string relating to a specific foster child; one redaction is superimposed "RCW 13.50.100" and a second "RCW". *Id.* at 94. In these circumstances, it is evident the Auditor attempted to place a full RCW number on each black box, and a technical error prevented the viewer from seeing the entire RCW number in the second box.

This type of situation is a technical issue over which requesters and agencies are encouraged to confer. WAC 44-14-05003. The PRA should not be interpreted in such a manner that a technical error such as this leads requesters to file lawsuits, seek *in camera* review, and seek an award of penalties and attorney fees, when this situation can be easily remedied by the agency without judicial intervention.

3. The Auditor Provided a Description of Exemptions in the December 21, 2011, Installment.

Contrary to Hobbs' argument, the Auditor provided more than citations to RCW 42.40.040(2) and 13.50.100 in the December 21, 2011, installment. Br. App. at 15.[17] In addition to redacting limited portions of the records and identifying the redactions with reference to these statutory exemptions, the Auditor provided a list of exemption codes. CP 269; Exhibit B (Exhibit C Disk1, Whistleblower exemption codes.docx). Thus, with its December 21, 2011, installment, the Auditor did more than simply superimpose statutory numbers on black redaction boxes. It also provided an explanation of redactions through use of its list of exemption codes that describe the types of information the Auditor redacts pursuant to RCW 42.40.040(2). This list sets forth six different explanations for how the

[17] Br. App. 15 refers to an incorrect statement in a letter from the superior court to argue no explanation was provided on December 21, 2011. CP 172. The superior court followed its letter with an order (CP 185-90) which did not repeat this incorrect statement.

redacted information would reveal information about a whistleblower or a witness in a whistleblower investigation.[18]

The Auditor provided the first installment quickly, making redactions and identifying pertinent statutes. After providing the first installment, the Auditor quickly responded to Hobbs' complaints that he was not satisfied with the Auditor's explanations, promptly providing updated records and explanations using codes in the second installment on December 30, 2011. Because the Auditor was still producing installments of records, it is irrelevant that Hobbs made his complaints in this lawsuit, rather than to the Auditor's public records officer as the Auditor would have expected.

Thus, contrary to Hobbs' assertions (Br. App. at 28), this case is unlike *Gronquist v. Washington State Dept. of Licensing,* 175 Wn. App. 729, 309 P.3d 729 (2013), where the agency produced the only requested record, a business license application, and redacted many types of information from that record, without providing a citation to a statutory exemption or any other explanation. Because the agency in *Gronquist* had completed its response to the request by providing one record, that case provides limited guidance here, where there were many records and they were provided in installments. Here, the Auditor had only begun to

[18] This exemption code list does not contain a reference to RCW 13.50.100, however.

produce records, had cited statutory exemptions for the records provided, and had provided a written explanation of how RCW 42.40.040(2) applied to some of the redactions.

This case is also distinguishable from *Koenig v. Lakewood*, 176 Wn. App. 397, 309 P.3d 610 (2013). There, this Court held that the City of Lakewood's citation to three statutes to support its redactions of drivers' license numbers had not provided a sufficient explanation for redacting drivers' license numbers. The first statute, RCW 42.56.050, provides an exemption related to privacy violations in a general fashion, but did not explain why disclosure of drivers' license numbers would be a violation of privacy. The other two statutes cited directed the Department of Licensing to make records of drivers' convictions and infractions, and limit the distribution of that record, but do not mention drivers' license numbers or otherwise expressly provide an exemption from disclosure. Again, these statutes do not provide an explanation of why a driver's license number would be exempt from public disclosure. Thus, the Court held that to briefly explain why a driver's license number would be exempt from disclosure required more than a mere reference to the three cited statutes. Thus, the *Koenig* decision does not stand for the asserted

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proposition that citation to a statute can never be adequate.[19]

In contrast to the facts in *Gronquist* and *Koenig*, Hobbs did not contest below nor in this appeal that RCW 42.40.040(2) and RCW 13.50.100 provide valid exemptions. Unlike the cited statutes in *Koenig*, it is clear that RCW 42.40.040(2) specifically exempts from disclosure the identifying characteristics of a whistleblower. In addition, the Auditor provided several explanations for the redacted information in the list it gave Hobbs on December 21, 2011. Exhibit B (Exhibit C Disk1, Whistleblower exemption codes.docx). In sum, the Auditor provided sufficient information for Hobbs and the court to understand what information the Auditor withheld and evaluate whether a valid exemption from disclosure existed.

E. The Auditor Timely Provided Acknowledgement Of The Request As Well As Frequent Time Estimates For Delivery Of Record Installments In Compliance With RCW 42.56.520

RCW 42.56.520 requires an agency to respond to the requester within five business days of receiving a records request. On December 2, 2011, the fifth business day after receiving Hobbs' request, the Auditor

[19] Contrary to Hobbs' argument, *Koenig* does not stand for the proposition that there is a "free-standing penalty" for violating the brief explanation requirement. Br. App. at 31. Such an appellate ruling would contradict the supreme court's holding in *Sanders*, 169 Wn.2d at 860. *Sanders* distinguished between fees and costs (as addressed in the first sentence of RCW 42.56.550(4)) and the penalty for denying the right to inspect or copy records addressed in the second sentence of 42.56.550(4). *Id. Accord Mitchell v. Dep't of Corrections*, 164 Wn. App. 597, 606, 277 P.3d 670 (2011) (penalties are available only for a party who prevails on a claim of being denied the right to inspect ... a record; a claim for the right to receive an exemption statement is not such a claim).

responded and estimated that the first installment of responsive records would be available any time after December 16, 2011. CP 266-67. This acknowledgement complied fully with RCW 42.56.520(3), which authorizes an agency to respond by acknowledging receipt of the request and providing a "reasonable estimate of the time the agency will require to respond to the request." The Auditor's five-day response also informed Hobbs of the review process for confidential foster child records based on the Auditor/DSHS datashare agreement.[20] It advised him that the Auditor could not yet give an estimated date for delivery of an installment because at that time it was unknown how long this review would take.

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[20] The datashare agreement assists the Auditor comply with various statutory protections for sensitive information. RCW 42.40.040(8)(a) and (c) require agencies to provide information to the Auditor during the course of investigations into whistleblower complaints. But when confidential information is provided for a whistleblower investigation, any further disclosure of that confidential information is prohibited. *See* RCW 42.40.030(2).

In addition, DSHS is required by law to maintain the confidentiality of records relating to foster children. RCW 74.04.060(1) (foster child programs are administered under Title 74 RCW, specifically RCW 74.13.250-.901). Similarly, RCW 13.50.100(2) provides confidentiality for the records of a juvenile care agency, including DSHS.

Under RCW 74.04.060(3), when DSHS releases confidential information to another public official, that public official may use the information "when performing duties directly connected with the administration" of DSHS programs, but the receiving official must treat such information with the "degree of confidentiality as is required by federal social security law." *Accord Dep't of Social & Health Services v. Latta*, 92 Wn.2d 812, 821, 601 P.2d 520 (1979) (DSHS obtained medical treatment records for audit purposes only; DSHS was not allowed to release the records to the public).

Federal law requires the State to restrict disclosure of personally identifiable information concerning children in foster care. The State Plan for foster care restricts the use or disclosure of information concerning individuals to purposes directly connected with the program, which includes investigations and audits authorized by law. 42 U.S.C. § 671 (a)(8)(B) and (D).

The Auditor continued to provide information about its production and time estimates for sending installments. On December 21, 2011, Leider told Hobbs, "[n]ext week, I will send you an estimate of when we will have the next installment ready." CP 269. On December 30, 2011, she informed him the second installment would be ready on January 13, 2012, and that with respect to the foster children records: "[a]s soon as we have a good estimate of time necessary to make required redactions, we will give you an estimated date [this] installment will be ready." CP 276.

On January 6, 2012, Leider emailed Hobbs, stating "[w]e have now communicated with DSHS regarding how long it will take DSHS to review records and comment on redactions . . .". CP 279. Her email estimated February 13, 2012, as the date for completing the Auditor's response. *Id.* Thereafter, she communicated an estimated time for the delivery of each remaining installment. CP 280, 281, 284, 289, 290, 292.

Despite these ongoing communications in fulfillment of the statutory requirements, Hobbs argues here that RCW 42.56.520(3) requires an agency within five days to give an estimated date for "completing" disclosure. Br. App. at 36-37. He relies on a Comment in the Model PRA Rules to argue that an agency's five-day response letter must give an estimate of time by which the agency will "*fully*" respond.

Br. App. at 4 (citing WAC 44-14-04003).[21] The actual model rule, WAC 44-14-040, mirrors the language of RCW 42.56.520(3) and states the agency will "...[p]rovide a reasonable estimate of when records will be available..."

A Comment to a nonbinding rule cannot change the meaning of the statute it purports to interpret by adding words to the statutory language. RCW 42.56.520 does not contain the words "fully" or "completely." Hobbs' argument that an estimate of time must relate to the "full" response reads into RCW 42.56.520(3) a requirement that is not expressly stated by the statutory language. The Auditor complied with this statute by promptly estimating the time for beginning to deliver installments, and updating the time estimates as the response to the request progressed.

Furthermore, none of the cases cited by Hobbs support his proffered interpretation of RCW 42.56.520. In two of those cases, agencies had completely failed to provide a written response within five days. *West v. Wash. State Dep't of Natural Resources,* 163 Wn. App. 235, 244, 258 P.3d 78 (2011); *Doe I v. Washington State Patrol*, 80 Wn. App. 296, 908 P.2d 914 (1996). In *Smith v. Okanogan Cy.*, 100 Wn. App. 7,

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[21] Hobbs cites not to a Model Rule, but to a Comment discussing a Model Rule. *Compare* WAC 44-14-00002 with WAC 44-14-040. In any event, Model Rules are "advisory and do not bind any agency". WAC 44-14-00003. The Auditor has adopted rules relating to its procedures under the PRA (WAC 48-13), but has not adopted this Comment cited by Hobbs.

994 P.2d 857 (2000), the agency had responded in writing to acknowledge receipt of the request, but had said nothing about the agency's plan for producing records. In *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983), the agency had failed for eleven months to provide any records nor any explanation of what the agency was doing to search and prepare records under FOIA, despite the requester's repeated contacts with the agency. In contrast to those cases, the Auditor provided a response within five days, told Hobbs it would provide records in installments, repeatedly informed Hobbs what it was doing to process records, provided frequent estimates of the next installment's delivery date and, when it could be determined, stated when production would be concluded. CP 256-57.

Hobbs argues the Auditor could have obtained information from DSHS sooner about how long it would take DSHS to review records. The Auditor acted promptly in response to Hobbs' request. The Auditor first contacted DSHS about the records in early December 2011, and prepared the responsive records it could to deliver to Hobbs by mid-December 2011. CP 251 ¶¶ 11-13. There is no legal requirement that the Auditor work simultaneously on more than one installment for Hobbs, or prioritize his records request over all other requests. Further, RCW 42.56.520 permits agencies to take additional time to respond based on the need to notify agencies affected by the request, or to determine whether exemptions apply. The superior court correctly found the Auditor's response time to fulfill Hobbs' request was "short." CP 1366.[22]

Hobbs refers to a PRA Model Rules Comment to argue that an agency must be able to explain how it arrived at its estimate and why the estimate is reasonable. Br. of App. at 38, 41. This argument actually supports the Auditor's position. For any reliable estimate of the time needed to process the DSHS records, it was necessary that the Auditor provide DSHS with copies of records to allow DSHS to estimate the time DSHS would need to review the records for necessary redactions. CP 251. ¶¶ 11-13; CP 256 ¶ 10. The Auditor could not provide an explanation to support an estimate of time without first obtaining that information from DSHS. Had the Auditor provided an estimate of the date of its complete response in its initial five day letter, the Auditor would have been guessing. The PRA does not force an agency to guess, thereby subjecting the agency to a lawsuit that its guess is unreasonable, as intimated by Hobbs. Br. App. at 38, 41.[23] It was entirely reasonable for the Auditor to continue to communicate with Hobbs about its efforts to establish an

[22] The Auditor had 82 other public records requests to work on at the same time as Hobbs' records request. CP 260. In addition, the same Auditor staff who worked on Hobbs' November 28, 2011 records request also assisted with preparing responses to Hobbs' lengthy discovery requests (CP 337), and a second January 2012 records request from Hobbs. CP 315 ¶ 17. The superior court properly weighed all of these circumstances when reaching its conclusion that the Auditor's response time was quick.

[23] A requester may file an action under RCW 42.56.550(2) if he believes the agency's estimate of time is not reasonable.

estimate of time, but to provide an estimated date to fully respond only after it had sufficient information to support that estimate.

Given the unique circumstances here – and the Auditor's frequent explanations of how it was processing records – the superior court properly concluded the Auditor complied with RCW 42.56.520(3).

F. The Auditor Reasonably Interpreted Mr. Hobbs' Record Request and Conducted a Search for Records in Full Compliance With the PRA

In his June 2012 deposition, Hobbs clarified his records request by identifying categories of records he believed would have been responsive to his November 28, 2011, request. The superior court correctly rejected his contentions that the Auditor read his request too narrowly and/or failed to search adequately for these additional categories of records.

1. The Auditor Conducted a Thorough Search for Records in Compliance with the PRA.

Agencies are to make available for inspection and copying "*identifiable* public records." RCW 42.56.080. The PRA does not "require public agencies to be mind readers." *Levy v. Snohomish Cy.*, 167 Wn. App. 94, 98, 272 P.3d 874 (2012); *Citizens for Fair Share v. Dep't of Corrections*, 117 Wn. App. 411, 434, 72 P.3d 206 (2003). Requesters must provide a reasonable description enabling the government to locate the requested records. *Bonamy v. Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998).

The adequacy of a search is judged by a standard of reasonableness; that is, the search must be reasonably calculated to uncover all responsive, documents. *Neighborhood Alliance v. Spokane Cy.*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011). "A search need not be perfect, only adequate." *Id.*, quoting *Meeropol v. Meese,* 790 F.2d 942, 956 (D.C. Cir 1986).

Hobbs argues the Auditor's search was inadequate. Br. App. at 20-24. This argument fails because it focuses solely on the activities of one Auditor staff member even though several Auditor staff worked on Hobbs' request, meeting repeatedly to discuss the ongoing production of records in response to the request. CP 313, ¶ 8. In these meetings, Auditor staff discussed various aspects of the public records response: places to search for records, search terms, who would collect and redact records, how to interpret the request, and that electronic records needed to be produced with metadata. CP 243-44, 246-47, 250-52, 255-59, 314-15, 324-26, 350. Auditor staff identified multiple search terms and several parts of the agency's records to search for responsive records. *Id.*

Hobbs argues at some length about what Auditor staff member Elliott did not know and did not do, but ignores the record describing others' participation in the search for and production of records. Hobbs asserts Ms. Elliott did not read the request, but cites nothing in the record to support this assertion. Br.App. at 44.[24] Hobbs similarly ignores relevant information when he argues Elliott failed to produce electronic documents at the time she prepared the 351-page investigation file for production. Br. App. at 21-22. This argument disregards that records were searched for and prepared not only by Elliott, but also by other Auditor staff members who worked on Hobbs' request, and that these electronic records were produced in later installments. CP 298, 325-26.

Further, the superior court soundly rejected any suggestion that records responsive to Hobbs' request had been destroyed after the Auditor's receipt of Hobbs' request. CP 1365 ¶16, 1372 ¶27. The record simply does not support Hobbs' speculation on this point. CP 249, 1249.

In sum, the Auditor conducted a thorough search fully compliant with the PRA. All responsive records held by the Auditor were disclosed.

2. The Auditor's Interpretation of Mr. Hobbs' Records Request was Reasonable.

Hobbs claims that his records request included such items as employee calendars, employee timekeeping data, and invoices. Br. App.

[24] Hobbs asserts no one went over the records request with Ms. Elliott. Br. App. at 21. This is both inaccurate and irrelevant because Elliott had a copy of the request, and her testimony was in response to a question about the month of December 2011, i.e. only one phase of the Auditor's efforts to respond to Hobbs. CP 1074, 1268-71.

at 24-25, 43, 46. The superior court ruled the plain language of the request does not support this argument, and agreed that the Auditor had reasonably interpreted Hobbs' request. CP 1365 ¶ 17. Hobbs' request did not mention calendars, timekeeping data, or invoices. CP 261-62, 1371 ¶22. The superior court correctly rejected Hobbs' argument that "invoice vouchers" are "correspondence" (CP 1365 ¶ 18; 1371¶ 20), and that a timekeeping database was a "log."[25] CP 1365, 1371 ¶¶ 20-23. Moreover, in response to the phrase "Outlook appointment emails and notes," the Auditor searched for Outlook appointment emails and produced them on three occasions. CP 257-58, 280, 285, 299.

Hobbs did not contact the Auditor after receipt of the final installment to clarify that he expected additional items to be produced. CP 312. Rather, these items were first mentioned during depositions three months after the Auditor ended its search and concluded its production. CP 351-52. Nevertheless, after Hobbs' deposition, the Auditor searched for and produced the additional types of records described by Hobbs. CP 317 ¶ 24, 1289-90.[26]

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[25] Hobbs now asserts that an Auditor staff member kept a diary, but the record does not support that assertion. Br. App. at 46.

[26] The Auditor initiated a search for the newly identified records and started to produce them to Hobbs. CP 312 ¶ 5, 316-17. Contrary to any implication at Br.App. 20 and 46, it was not necessary for the superior court to compel the Auditor to produce additional records. Rather, nine days after the Auditor first produced additional records, the court addressed the production of additional records as a scheduling matter, issuing an order amending the case schedule. CP 604.

Requesters must provide a reasonable description enabling government employees to locate the requested records. *Bonamy*, 92 Wn. App. at 410. Thus, a broad request for "all documents" related to a topic does not create liability solely because the requester later thinks of a type of document that it believes may be related to its request. When a requester challenges an agency's search, the focus of the court's inquiry is whether the agency's search was adequate, not whether responsive documents exist. *Neighborhood Alliance,* 172 Wn.2d at 719-20.

The PRA is not to be used as a guessing game wherein an agency is required to decipher the hidden thoughts of a requester. Had Hobbs clearly requested these records at any time during the production of records, the Auditor would have provided them as part of its ongoing production. CP 312-13. The superior court properly agreed that the Auditor had reasonably interpreted Hobbs' original records request, and that his deposition testimony was a clarification of his original request. CP 1371 ¶¶ 19-24. This Court should do the same and reject this claim.

3. Mr. Hobbs Did Not Request a Search of Disaster Recovery Tapes for Potentially Responsive Records.

Hobbs' original request described records and locations of records in a very thorough manner. CP 261-62. However, during his deposition, Hobbs clarified what he requested by asserting that the Auditor should have searched "disaster plans for backups", or what his counsel termed as "back up tapes" for potentially responsive records. CP 358-59. However, Hobbs' records request did not mention any type of backup disaster storage system or "tape". It references the term "backup" only when addressing "records that have been revised numerous times and backed up in electronic form each day". CP 261-62. Auditor staff reasonably interpreted this as a request for all versions or backups of documents on computer networks or Sharepoint. The word "backup" did not clearly communicate that Hobbs meant any "tape" made by the Auditor's staff to allow it to recover its entire system in the event of a disaster.[27] An Auditor staff member who worked on Hobbs' request, who was familiar with the Auditor's computer systems and who took regular training on the PRA, stated that the term "backup" standing alone in the context used by Hobbs did not connote "tape." CP 312 ¶ 4, 316 ¶¶ 21-23. The Auditor reasonably interpreted the request as requesting all versions or backups of documents, but did not understand it to request a search of disaster recovery "tapes." CP 316-17.

Once Hobbs clarified during discovery that he expected the Auditor to search "disaster plans for backups" or "tapes", the Auditor

[27] Disaster recovery tapes are prepared so that the Auditor's computer servers could recover data in the event of a natural disaster, hardware failure, or human error. CP 1295-96.

restored records from its disaster recovery tapes. CP 1297. Although these tapes are not searchable by specific search terms, Auditor staff was able to locate and restore from these tapes electronic records relating to Whistleblower Case 10-005 which had been deleted from the Auditor's server.[28] *Id.* The Auditor produced these records to Hobbs after preparing redactions to the records and their metadata. CP 1288-90.

The Auditor's interpretation of the request was reasonable, as the superior court correctly found. CP 1365 ¶¶17, 19-20; 1371-72, ¶¶21-26. The term "back up" is not limited in its application to disaster recovery tapes, and therefore, is not clearly a request to search them. The term "backup" in some contexts means a computer network. *See Neighborhood Alliance v. Spokane County,* 153 Wn. App. 241, 250, 224 P.3d 775 (2009), *rev'd and remanded,* 172 Wn.2d 702, 261 P.3d 119 (2011) (referring to Spokane County's system that backed up documents to a "network drive"). Here, the Auditor gave meaning to the word "backup" in Hobbs' request by searching hard drives, its network drive, and Sharepoint.

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[28] These disaster recovery tapes are not intended to be, nor are they made to function as, a searchable archive of data. Auditor IT staff have not conducted a search of all content of disaster recovery tapes using search terms, and staff do not currently know if it is possible to conduct such a search of these tapes. The only type of search Auditor IT staff has been asked to perform is to manually retrieve a specific document when the employee who lost the document can identify the document and a specific location on the Auditor's network. With this information, the network manager may be able to locate a specific document or data on a disaster recovery tape. CP 1295-97 ¶¶ 3-7.

No court has held that there is a *per se* rule under the PRA requiring agencies to search disaster recovery tapes. In *Greenhalgh v. Dep't of Corrections*, 160 Wn. App. 706, 712, 248 P.3d 150 (2011), in response to a request for a "pricelist," the agency wrote to the requester stating it would explore whether a search for the pricelist on "back up" tapes would be feasible, but the agency did not search the tape because it determined that the tape did not pertain to the correct time period. In *West v. Dep't of Natural Res.*, 163 Wn. App. 235, 240, 258 P.3d 78 (2011), the court considered an agency system upgrade that resulted in inadvertent loss of emails. Although the agency unsuccessfully attempted to search tapes to recover lost emails, the court did not announce a *per se* rule requiring a search of tapes; it also held the agency did not violate the PRA by not producing the lost emails. 163 Wn. App. at 246.

Hobbs' citation to WAC 434-662-040 (Br. App. at 23, 46) is also inapposite because it relates to electronic version of records that must be retained according to the Secretary of State's retention schedules. This rule does not establish a standard for adequate searches under the PRA.[29]

Based on the plain language of Hobbs' request, and the Auditor's reasonable understanding of backup copies in the Auditor's computers

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[29] Moreover, the superior court correctly rejected Hobbs' argument below that the Auditor failed to retain records in violation of WAC 434-662-040. CP 1248-49, 1370, ¶18.

network and software, the Auditor had no reason to conclude that Hobbs was requesting a search of disaster recovery tapes. Based on the actual wording of Hobbs' request, this Court should conclude that the Auditor reasonably interpreted the request and conducted a reasonable search that fully complied with the PRA.

G. Mr. Hobbs' Request for Fees and Costs Must Be Denied

The Court should deny Hobbs' request for attorneys' fees and costs. Hobbs is not entitled to fees and costs because he did not prevail below and he should not prevail in this appeal.

VI. CONCLUSION

The superior court observed first-hand the Auditor's efforts to fully respond to Hobbs' request, to provide helpful explanations of redactions, and to produce accurate copies of records and narrow redactions. The superior court correctly applied the PRA. This Court should affirm.

RESPECTFULLY SUBMITTED this 16th day of December, 2013.

ROBERT W. FERGUSON
Attorney General

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Senior Counsel
Attorneys for Respondent

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below via electronic mail and by U.S. Mail Postage PrePaid via Consolidated Mail Service to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of December, 2013, at Olympia, WA.

LORI A. GOODWIN
Legal Assistant

APPENDIX “A”

Exemption Codes for PRR# 1513 – WB 10-005 - DSHS

RCW 42.40.040(2)

[1] Whistleblower name, contact information (e.g. phone number, address, email address), position and/or agency name that would reveal the identity of the whistleblower

[2] Information in the description of events related to the alleged improper governmental action that is specific enough to reveal the identity of the whistleblower

[3] Information provided by the whistleblower relating to the location of evidence that is specific enough to reveal the identity of the whistleblower

[4] Witness name, contact information (e.g. phone number, address, email address), position and/or agency name that would reveal the identity of the witness

[5] Information in the description of events related to the alleged improper governmental action that is specific enough to reveal the identity of a witness

[6] Information provided by the whistleblower relating to the location of evidence that is specific enough to reveal the identity of a witness

RCW 42.56.420(4)

[7] Information that pertains to the infrastructure of the database, consisting of information that could allow access to a secure system or software application.

[8] Information regarding the infrastructure of a compute network, consisting of error reports that are security test results that identify system vulnerabilities.

[9] **RCW 13.50.100(2), RCW 42.56.230(1), RCW 74.04.060(1) and (3), RCW 42.56.070(1), 42 U.S.C. 671(a)(8).** Names of foster children obtained from files and records maintained by DSHS, and communications with DSHS.

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[7] Information that pertains to the infrastructure of the database, consisting of information that could allow access to a secure system or software application.

[8] Information regarding the infrastructure of a compute network, consisting of error reports that are security test results that identify system vulnerabilities.

Information obtained from DSHS foster children's records

[9] **RCW 13.50.100(2), RCW 42.56.230(1), RCW 74.04.060(1) and (3), RCW 42.56.070(1); 42 U.S.C. 671(a)(8).** Names of foster children obtained from files and records maintained by DSHS, and communications with DSHS.

[10] Foster child's name: **RCW 13.50.100(2), RCW 74.04.060(1), RCW 42.56.070(1), RCW 42.56.230(1); 42 U.S.C 671(a)(8).** In addition, files containing health information protected by Health Insurance Portability and Accountability Act of 1996 (HIPAA) must be de-identified pursuant to **45 CFR 164.514(b)(2)(i)(A).**

[11] Foster child's social security number: RCW 13.50.100(2), RCW 74.04.060(1), RCW 42.56.070(1), RCW 42.56.230(2); 42 U.S.C 671(a)(8). In addition, files containing health information protected by Health Insurance Portability and Accountability Act of 1996 (HIPAA) must be de-identified pursuant to 45 CFR 164.514(b)(2)(i)(G).

[12] Foster child's birthday: RCW 42.56.230(2), RCW 13.50.100(2), RCW 74.04.060(1), RCW 42.56.070(1), 45 CFR 164.514(b), and 42 U.S.C 671(a)(8). In addition, files containing health information protected by HIPAA must be de-identified pursuant to 45 CFR 164.514(b)(2)(i)(C).

[13] Foster child's address: RCW 13.50.100(2), RCW 74.04.060(1), RCW 42.56.070(1), 42 U.S.C 671(a)(8), and RCW 42.56.230(2). In addition, files containing health information protected by HIPAA must be de-identified pursuant to 45 CFR 164.514(b)(2)(i)(B).

[14] Foster child's DSHS case number and person ID number: RCW 13.50.100(2), RCW 74.04.060(1), RCW 42.56.070(1), and 42 U.S.C 671(a)(8). In addition, files containing health information protected by HIPAA must be de-identified pursuant to 45 CFR 164.514(b)(2)(i)(I) and (J).

[15] Foster parent's address: RCW 42.56.070(1), RCW 13.50.100(2), RCW 74.04.060(1), and RCW 42.56.230(2) and (3). In addition, files containing health information protected by HIPAA must be de-identified pursuant to 45 CFR 164.514(b)(2)(i)(I) and (J).

[16] Foster parent's phone number/email address: RCW 42.56.070(1), RCW 74.04.060(1), and RCW 42.56.230(2) and (3). In addition, files containing health information protected by HIPAA must be de-identified pursuant to 45 CFR 164.514(b)(2)(i)(D) and (F).

[17] Bank account numbers for foster child's SSI dedicated accounts: RCW 13.50.100(2), RCW 42.56.230(5), RCW 74.04.060(1) and (3), RCW 42.56.070(1), and 42 U.S.C. 671(a)(8). In addition, files containing health information protected by HIPAA must be de-identified pursuant to 45 CFR 164.514(b)(2)(i)(J).

[18] Criminal warrant/court cause numbers related to a foster child: RCW 13.50.100(2), RCW 74.04.060(1), RCW 42.56.070(1), and 42 U.S.C 671(a)(8). In addition, files containing health information protected by HIPAA must be de-identified pursuant to 45 CFR 164.514(b)(2)(i)(R).

[19] Foster child's school name or medical treatment center: RCW 13.50.100(2), RCW 74.04.060(1), RCW 42.56.070(1), and 42 U.S.C 671(a)(8). In addition, files containing health information protected by HIPAA must be de-identified pursuant to 45 CFR 164.514(b)(2)(i)(B).

Goodwin, Lori (ATG)

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