

70757-4

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NO. 70757-4-I

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

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RECEIVED  
COURT OF APPEALS  
DIVISION ONE

JAN 2 - 2014

KAMAL MAHMOUD,

Appellant,

v.

SNOHOMISH COUNTY,

Respondent.

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BRIEF OF APPELLANT

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## I. INTRODUCTION

Mr. Kamal Mahmoud made multiple requests to Snohomish County (“County”) under the Public Records Act (“PRA”). RCW 42.56. *et seq.* for all but one of Mr. Mahmoud’s claims, the trial court ruled the County did not violate the PRA. Mr. Mahmoud seeks reversal and remand of the following errors by the trial court to accord with the requirements of the PRA and interpreting authority.

First, it is undisputed that, in response to the PRA requests, the County failed to locate, disclose or produce all the responsive records it possessed. Indeed, the County cannot dispute it failed to search the locations for such records as explicitly requested by Mr. Mahmoud. However, the trial court erroneously ruled the County conducted reasonable searches as a matter of law. The ruling undermines the PRA because it contradicts controlling authority mandating that agencies must search all places reasonably likely to contain the records.

Second, the trial court erred by further ignoring controlling authority when it found the PRA’s statute of limitations was triggered as to the County’s response to a PRA request based on a categorical exemption claim to unidentified records. As such, the claim was insufficiently detailed to trigger the statute of limitations and the trial court thus erred as a matter of law.

Third, the trial court erred when it applied a two-year catch-all statute of limitations defense to other PRA claims. The County cannot dispute it failed to respond to the PRA requests in any manner and Mr. Mahmoud did not discover the responsive records until after the purported statute of limitations had run.

Fourth, the County delayed responding to certain PRA requests beyond the original estimates without justification. The County inexplicably took over eight months to disclose incomplete responsive emails from its employees. However, the trial court failed to find that the County's delays violated the PRA despite authority holding otherwise.

Fifth, when the County did claim exemptions for withheld records, the claims were insufficiently detailed. They did not identify the number of pages withheld or how the exemption applied to the records, yet the trial court failed to find this violated the PRA.

Sixth, the trial court erred by entertaining a new legal argument by the County on reconsideration of its summary judgment motion.

Finally, the trial court abused its discretion when it awarded only a minute fraction of Mr. Mahmoud's attorney fees as a prevailing party under the PRA. The court awarded less than half the amount conceded by the County as reasonable. Further, in opposition to the court's rationale for its award, the fee

request already reflected a reduced amount to account for the unsuccessful claims.

## II. ASSIGNMENTS OF ERROR

### A. Decisions in Error

**Decision in Error No. 1.** The trial court erred in granting the County's Motion to Reconsider under CR 59(a)(7) based on a new legal argument by the County that it had failed to present in its underlying Motion for Partial Summary Judgment and/or the Reply thereto and the County had no good faith basis for failing to present the new legal theory in the underlying Motion. CP 1055-57.

**Decision in Error No. 2.** The trial court erred in dismissing PRA claim(s) arising from Mr. Mahmoud's requests associated with PRA # 09-05374 as time-barred by the SOL based upon the County's Motion for Reconsideration. *Id.*

**Decision in Error No. 3.** The trial court erred when it dismissed Mr. Mahmoud's PRA claims associated with his PRA requests, numbered: 09-05375, 10-0166, 10-08592, 10-08593, finding the County's searches were reasonable as a matter of law and did not violate the PRA. The trial court also erred in the same order by finding the County's exemption logs in response to the above requests were proper as a matter of law, and its delays in responding to Mr. Mahmoud's PRA requests did not violate the PRA as a matter of law. CP 1829-31.

**Decision in Error No. 4.** The trial court abused its discretion in awarding

\$18,055 in attorney's fees to Mr. Mahmoud. CP 2115-18.

**B. Issues Related to Assignments of Error**

**Issue No. 1.** Did the trial court err in its order of February 8, 2013 when it found upon reconsideration of the County's summary judgment motion that the PRA SOL barred Mr. Mahmoud's PRA claim arising from his request on July 31, 2009, under the PRA, for records pertaining to an internal EEO investigation conducted by the County? (Decision in Error 2.)

**Issue No. 2.** Did the trial court err in the same order of February 8, 2013 when it found upon reconsideration that the two-year SOL under RCW 4.16.130 barred Mr. Mahmoud's PRA claims arising from his PRA requests in October 2009 and February 2010? (Decision in Error 2.)

**Issue No. 3.** Did the trial court err in the order of February 8, 2013 in granting the County's CR 59(a)(7) Motion to Reconsider in which the County first asserted that the RCW 4.16.130 two-year SOL applied to the above-identified PRA requests? (Decision in Error 1.)

**Issue No. 4.** Did the trial court err in its order of April 14, 2013 when finding the County's search for emails in response to PRA requests by Mr. Mahmoud were reasonable as a matter of law? (Decision in Error 3.)

**Issue No. 5.** Did the trial court err in its order of April 14, 2013 when it

found that the County's failures to follow leads to locate the undisclosed, responsive emails were reasonable as a matter of law? (Decision in Error 3.)

**Issue No. 6.** Did the trial court err in its order of April 14, 2013 when it found that the County's claims for exemption in response to Mr. Mahmoud's PRA requests were adequate as a matter of law? (Decision in Error 3.)

**Issue No.7.** Did the trial court err in its order of April 14, 2013 when it found that the County's delays in responding to certain PRA requests were adequate as a matter of law? (Decision in Error 3.)

**Issue No. 8.** Did the trial court err in awarding attorney's fees to Mr. Mahmoud in the amount of \$18,055? (Decision in Error 4.)

**Issue No. 9.** Is Mr. Mahmoud entitled to reasonable attorney fees on prevailing claims through final resolution of his PRA lawsuit?

### **III. STATEMENT OF THE CASE**

Plaintiff/Appellant Kamal Mahmoud was born in Kuwait and is a practicing Muslim. CP 417. He is a civil engineer who was employed by Defendant/Respondent Snohomish County from July 10, 2006 until December 31, 2009. Id. In May 2009, Mr. Mahmoud filed an internal EEO complaint alleging that his supervisors removed him from a position based on unlawful discrimination and/or retaliation. Id.

In a further attempt to obtain the truth and restore his good name, Mr. Mahmoud sought records related to the decision to terminate his position. He made six requests (and three re-requests) under the PRA to the County that are at issue here.<sup>1</sup> CP 120, 129-30, 132-33, 379, 388, 392-93, 402, 973-79, 1562, 2435-38. The County produced some records in response to some of the requests, but failed to identify, produce, or claim an exemption for over 400 records requested. CP 418-19, 423-971.

On June 30, 2011, Mr. Mahmoud filed a complaint in King County Superior Court against the County, alleging, *inter alia*, that it had discriminated and retaliated against him based on his protected class and activities. CP 3-10.<sup>2</sup>

During litigation, Mr. Mahmoud issued discovery requests to the County. CP 1129-30, 1137. On March 12, 2012, for the first time, the County produced hundreds of records responsive to the previous PRA requests. CP 418-19, 423-971. However, the County had not previously disclosed or claimed exemptions for these records. CP 128-29, 384-86, 390, 404-05, 417-18, 423-971, 1564. On August 30, 2012, Mr. Mahmoud amended his complaint against the County alleging PRA violations. CP 18-23. The following summarizes each PRA request made by Mr. Mahmoud, the County's responses, and the trial court's decision(s).

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<sup>1</sup> Mr. Mahmoud made one other PRA request (PDR #10-08644) that is not at issue in this appeal.

<sup>2</sup> These claims were resolved during mediation and subsequently dismissed.

**A. Mr. Mahmoud's PDR #09-05374**

On July 31, 2009, Mr. Mahmoud made his first PRA request for a copy of the records in the investigation file arising from his internal EEO complaint:

In May of 2009, [a]fter I met with the EEO Officer, Mark Knudson, he informed me that he would be conducting an internal investigation into my complaint about discrimination by Max Phan, Bruce Duvall, and Art Louie. I am making a request under the public records act (RCW 42.56), requesting a copy of the investigation file, to include all interview notes, documents, emails and findings related to my complaint.

CP 129-130. The County identified the request as PDR-09-05374. CP 125-126.

**1. The County's Response**

The County provided no documents in response to Mr. Mahmoud's PRA request. CP 128-29. Instead, on August 7, 2009, the County claimed a categorical exemption to the records, but failed to identify them with any specificity; instead, it simply stated that the responsive records were exempt because the investigation was "still being conducted" citing RCW 42.56.250(5). *Id.*

**2. The County Failed to Respond to Mr. Mahmoud's Subsequent PRA Requests for the Same Records**

Based on the County's failure to provide a substantive response, on October 20, 2009, two and a half months after the County's response and about five months after the EEO investigation began, Mr. Mahmoud's counsel, re-issued the request under the PRA for the same records to the County. CP 129-30,

132-33. The request, sent by mail and email, specifically stated,

it is imperative that Mr. Mahmoud first receive Mark Knudson's investigation file concerning Mr. Mahmoud's complaint of discrimination about Max Phan, Bruce Duvall and Art Louie [Mr. Mahmoud's supervisors].... Please provide the requested public records to Mr. Mahmoud no later than the close of business on Friday, October 23, 2009."

CP 132-33. The County failed to respond to this PRA request. CP 128.

On February 11, 2010, Mr. Mahmoud, again through counsel, requested the same records under the PRA by sending a certified letter and email to the County. CP 2435-38. This request came six months after the County's August response and about nine months after initiating the EEO investigation. Id.

The County again failed to respond in any manner. CP 418. The County did not indicate whether the investigation was "still being conducted" or otherwise claim an exemption. Id. Nor did it disclose the existence of any responsive records. Id. The County cannot dispute that the responsive records existed and the requests went to the correct addresses. Id.

Since the County failed to respond at all to either request, Mr. Mahmoud had no idea whether responsive records were being withheld appropriately. In other words, the County silently withheld these records.

### **3. The County Failed to Produce All Responsive Documents**

On or about February 8, 2012, Mr. Mahmoud made a request to the

County under CR 34 for documents related to his civil discrimination claims. CP 1129-30, 1137. Pursuant to CR 34, on March 14, 2012, the County finally produced the investigation notes and transcripts of the interviews from the EEO complaint identified in PDR #09-05374 and Mr. Mahmoud's follow-up requests of October 2009 and February 2010. CP 418, 422-536. Thus, it is indisputable the County withheld these documents. It did not attempt to claim an exemption in response to his two subsequent requests for these records pursuant to the PRA and withheld them for over two and a half years. CP 128-129, 417-18, 422-536.

#### **4. Disposition at Trial Court**

Upon reconsideration, the trial court ruled that the PRA SOL barred the first request of July 31, 2009 and dismissed the claim; the trial court also dismissed the other claims, in which Mr. Mahmoud's counsel subsequently re-requested the records, based on a two-year SOL under RCW 4.16.130. CP 1056.

#### **B. Mr. Mahmoud's PDR #09-05375**

On July 31, 2009, Mr. Mahmoud made the following PRA request:

I am requesting all emails sent to and from Max Phan, Bruce Duvall, Art Louie, Julie Peterson, Steve Thomsen, Debbie Terwillger, including archived emails on the individuals C drive, P drive, or any other county network drive. I want these emails in their native format (.pst) and copied to a CD. This request is from present back to January 1, 2008. I also request electronic copies of any policies or procedures related to preservation, back-up, and/or

archiving of emails by the Department of Information Services.

CP 48. The County received this request on August 3, 2009, and identified it as PDR # 09-05375. CP 44, 48.

### **1. The County's Response**

On September 3, 2009 the County stated the records would not be available until September 25, 2009. CP 1566. However, the County failed to respond by that date and, on October 20, 2009, Mr. Mahmoud's counsel again requested the records. CP 126, 132-33. The County produced the first installment of records the next day, October 21, 2009. CP 1569.

On April 2, 2010, over five months later, and without justification as to the delay, the County provided its second and final response of records. CP 52. It also provided an exemption log referencing eighteen emails. CP 1564. The exemption log failed to identify how the claimed exemptions applied to the records in question and the number of pages exempted. Id.

### **2. Mr. Mahmoud Informs the County of Incomplete Response**

It is undisputed the County searched for the responsive emails only in the email accounts of the individuals identified in the request: it did not search all locations explicitly stated in the request, ("any other county network drive"), nor did the County relay to Mr. Mahmoud that it narrowed the scope of the search in

contrast to his request. CP 1078.

On June 4, 2010, Mr. Mahmoud, suspicious the County was not producing all the emails, reopened his request by email to the PRA officer:

The CD that is being mentioned does not have most of the info I requested. There are only 24 emails from Max Phan from January 2008 to March 2009, no emails from Bruce Duvall, Max supervisor and no emails from Art Louie... I want to let you know that providing me in April of 2010 (9 months after the original written request) with what the County claims to be the final installment of the public records information that I requested in July 2009, lacking most of the emails and information is not acceptable to me. If you recall I submitted the original request for the subject public records disclosure request in July of 2009. Please provide me as soon as possible without any further delays with all the information that I requested in the subject public disclosure request (PDR 09-05375).

CP 418-19, 973-79. By re-opening the request, Mr. Mahmoud specifically asked for all emails responsive to the request. Id. The County responded suggesting the emails were destroyed; regardless, it failed to re-open the request and search for the records it in fact possessed on its network drive(s). Id. The County cannot dispute it failed to take any action based on Mr. Mahmoud's June 4, 2010 email.

### **3. The County Failed to Produce All Responsive Documents**

During discovery, Mr. Mahmoud requested documents from the County under CR 34 similar to those requested in PDR #09-05375. Within thirty days of the CR 34 request, the County produced previously undisclosed documents

responsive to Mr. Mahmoud's PRA request. CP 417-18, 1130, 1139, 1144-1390.

A thorough review of the documents produced in March 2012 revealed that the County's assurances in June 2010 that no additional documents existed in response to PDR #09-5375 were false. Numerous records were provided in March 2010 that were responsive to the July 31, 2009 PRA request that were never previously disclosed, produced or referenced on the exemption log(s) to the initial and June 2010 requests. CP 132-33, 417-18, 1130, 1139, 1144-1390, 2435-38. The County has presented evidence the responsive records were on its network drive(s) through March 2012. CP 1639.

In discovery, the County also produced a modified exemption log to the PRA request that Mr. Mahmoud had not previously seen in response to the PRA request. CP 411-13. This log also fails to identify how the claimed exemptions apply to the records and the number of pages exempted; it also does not identify the silently withheld records. Id.

#### **4. Disposition at Trial Court**

The trial court found the County's search was reasonable. CP 1829-30. It also found the exemption claims, the delays in production, and the failure to re-open the search based on the June 4, 2010 request, did not violate the PRA. Id.

**C. Mr. Mahmoud's PDR #10-01666**

On or about March 15, 2010, Mr. Mahmoud emailed a PRA request to the County, identified as PDR #10-01666, requesting the following:

I am requesting all emails sent to and from Craig Ladiser, former Deputy Director of PDS Greg Morgan, Tom Rowe, and Heather Coleman, including any archived emails on the individuals C drive, P drive, or any other county network drive. I want these emails in their native format (.pst) and copied to a CD. **This request is from January 1, 2009 to March 1, 2009.** I also request electronic copies of any policies or procedures relating to preservation, back-up, and/or archiving of emails by the Department of Information Services.

CP 379 (emphasis in original).

**1. The County's Response**

After an initial delay of over two months, the County produced a first installment of records on May 21, 2010, a second installment on June 10, 2010, and a third and purportedly final installment on June 29, 2010. CP 1583, 1586. The County also provided another record and an inadequate exemption log on July 12, 2010, nearly four months after the initial request. CP 1588. The County failed to provide any justification for the delays. CP 1583-90.

**2. Mr. Mahmoud Informs County of Incomplete Response**

Mr. Mahmoud reviewed the production and found that no records related to Mr. Rowe were produced. He contacted the County to inform it that records

were missing. CP 381-82. The County responded by admitting it failed to produce them and produced an additional installment on November 22, 2010. Id.

### **3. The County Failed to Produce All Responsive Documents**

During discovery, the County produced at least one document responsive to this PRA request that it had not previously identified, produced, or claimed as exempt. CP 384-86, 419, 736, 1139. Mr. Mahmoud first became aware that the County silently withheld the responsive record in March 2012. CP 736, 1139. The County again unilaterally narrowed the PRA request and only searched the email accounts of the specified individuals rather than searching “any county network drive” as requested. CP 1077-78.

The County’s exemption log failed to explain how the claimed exemptions applied, the extent of the exemptions, and the number of pages exempted. CP 384-86. In discovery, the County again produced an additional log to this PRA request. CP 415-16. Again, the log fails to identify how the claimed exemptions apply to the documents in question and the number of pages exempted. Id.

### **4. Disposition at Trial Court**

The trial court found the County’s search was reasonable. CP 1830. It also found that the delays and exemption logs did not violate the PRA. Id.

**D. Mr. Mahmoud's PDR #10-05383**

On July 23, 2010, Mr. Mahmoud requested journal entries and certain other records concerning him, made by his former supervisor, Mr. Max Phan:

Please provide any and all entries made by Max Phan from January 2008 to August 2009 in his 'journal' and/or other notes and files, concerning Kamal Mahmoud. This request is intended to include but not limited to any entries regarding alleged complaints regarding Mr. Mahmoud received by Mr. Phan from Ray Desimone, Jeff Rivers, David Schnell, Joanne Becker, or any other individual.

CP 1597-98.

**1. The County's Response**

The County failed to provide the responsive records by the initial estimated date. CP 388. On August 16, 2010 the County responded, purportedly producing "all documents responsive to [Mr. Mahmoud's] request". CP 390. It claimed one record as exempt, but failed to explain how it was exempt or the number of pages. Id.

**2. The County Failed to Produce All Responsive Documents**

Mr. Mahmoud again requested the journal in discovery. CP 1129-30, 1137. In response, the County produced records responsive to the PRA request, which it had failed to produce and were not claimed as exempt. CP 419, 1622-27.

### **3. Disposition at Trial Court**

The trial court found the County violated the PRA by conducting an unreasonable search and failing to produce the additional records. CP 1829-30. However, it also found the exemption claim was adequate. Id. Nevertheless, Mr. Mahmoud prevailed under the PRA on this claim. Id.

#### **E. Mr. Mahmoud's PDR #10-08592**

On December 5, 2010, Mr. Mahmoud requested all emails sent to or from three supervisors for a four-month period on any network drive:

I am requesting all emails to and from Max Phan, Bruce Duvall, and Art Louie **from October 1, 2008 to January 31, 2009**, including any archived emails on the individuals' C drive, P drive, or any other county network drive. I want these emails in their native (.pst) and copied to a CD. I also request electronic copies of any policies or procedures related to preservation, back-up, and/or archiving of emails by the Department of Information Services.

CP 392-93.

#### **1. The County's Response**

As to the emails, the County responded stating that it could not find any responsive documents; when pressed by Mr. Mahmoud as to their absence, the County stated it was likely because they were deleted. CP 395-96. The County did not claim any exemption. CP 419.

## **2. The County Failed to Produce All Responsive Documents**

The County did in fact maintain and retain the responsive documents as they produced them in discovery over two years later. CP 745-956, 1639. Again, it appears the County unilaterally narrowed the request and only searched the email accounts of the specified individuals rather than searching “any other county network drive” as requested. CP 1077-78. Further, the County failed to present any evidence that it actually searched for these records. CP 1074-78.

## **3. Disposition at Trial Court**

The trial court found that the County’s search, limited to only the emails accounts of the identified individuals, was reasonable, and that no violation of the PRA had occurred. CP 1829-30.

## **F. Mr. Mahmoud’s PDR #10-08593**

On December 5, 2010, Mr. Mahmoud made the following request:

I am requesting all emails sent to and from Tom Rowe, and Larry Adamson, including any archived emails on the individuals C drive, P drive, or any other county network drive. I want these emails in their native format (.pst) and copied to a CD. **This request is from September 1, 2009 to December 31, 2009.**

CP 402.

### **1. The County’s Response**

On February 18, 2011, the County produced an incomplete final

production of documents in response to the request as well as an exemption log that did not detail the number of pages exempted, how the claimed exemption applied, or the extent of the claim. CP 399-405.

## **2. The County Failed to Produce All Responsive Documents**

The County first produced the previously undisclosed responsive records in March 2012. CP 419, 958-71. As before, the County unilaterally narrowed Mr. Mahmoud's request and only searched the email accounts of the specified individuals rather than searching "any network drive" as requested. CP 1077-78.

## **3. Disposition at Trial Court**

The trial court found that the County's search was reasonable, and that the exemption log did not violate the PRA. CP 1829-30.

## **G. Mr. Mahmoud's Prevailing Attorney's Fees and Costs**

As a prevailing party on a PRA claim, Mr. Mahmoud's submitted a fee petition. CP 1847-59. His attorney's fees for his PRA claims totaled \$194,240. CP 1991-92, 2084. He sought a reduced amount of \$126,385 to exclude the work performed on unsuccessful claims. CP 1915-16. In contrast, the County asserted that a fee award between \$36,547.24 and \$38,571.24 was reasonable. CP 1940.

As set forth in the Argument section infra, Mr. Mahmoud asserted his fees and costs attributable to his prevailing claim were inextricably intertwined with

the other PRA claims. CP 1861-62. For example, investigating his claims, amending the complaint, and defending his claims against the same legal issues on summary judgment involved virtually the same work. Id. and CP 1991.

To the extent his attorneys could segregate their fees, they did. On April 17, 2013, after the other claims were dismissed, the attorneys only incurred and requested fees for pursuing the one prevailing claim (except for a motion for reconsideration, for which he did not seek to recover fees). CP 1854. The requested fees incurred after April 17, 2013 were \$33,171. CP 1998, 2085. It is clear that the trial court did not consider these facts, despite its rationale for reducing the fee request. CP 2117.

Rather, the trial court awarded Mr. Mahmoud 1/7<sup>th</sup> of the already reduced fee request. Id. This did not take into account that one of the claims was dismissed prior to work being performed, and the other facts set forth above. CP 1861.

#### IV. ARGUMENT

Judicial review of all agency actions challenged under the public records act is de novo. Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 733 (2009) (citing Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243 (1994)).

The PRA mandates broad public disclosure. RCW 42.56.030 (“The

people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”) The PRA's disclosure provisions must be liberally construed and its exemptions narrowly construed. RCW 42.56.030. Thus, the burden of proof is on the agency to establish that any refusal to permit inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part. RCW 42.56.550(1).

**A. The County’s Pattern of Unilaterally Limiting Searches is Unreasonable**

The trial court erred when it found, as a matter of law, that the County conducted reasonable searches for responsive emails as to four of Mr. Mahmoud’s PRA requests (#09-05375, #10-01666, #10-08592, and #10-08593). CP 1829-31.

The Washington Supreme Court has held “the adequacy of a search for records under the PRA is the same as exists under FOIA.” Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 719 (2011). Therefore, federal cases examining FOIA provide guidance as to whether the County complied with the PRA on this issue. In looking to such cases interpreting whether a search is adequate, Neighborhood Alliance affirmed the following:

agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered...[2] The search should not be limited to one or more places if there are additional sources for the information requested...[3] the agency

cannot limit its search to only one record system if there are others that are likely to turn up the information requested.

Id. at 720 (citing Valencia–Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999), and quoting Oglesby v. U.S. Dep’t of Army, 920 F.2d 57, 68 (D.C. Cir. 1990)).

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*. Id. at 720. (citing Weisberg v. U.S. Dep’t of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (emphasis added)). An inadequate search is comparable to a denial because the result is the same. Id. at 722.

Agencies are required under FOIA and the PRA to search all locations in which responsive documents are reasonably likely to exist. Id. at 720 (holding it was unreasonable for the agency not to search a non-functioning hard-drive placed in storage); Oglesby v. Dep’t of the Army, 920 F.2d 57, 68 (D.C.Cir. 1990) (unreasonable to search only one records system if another records system is likely to have responsive documents); Campbell v. U.S. Dept. of Justice, 164 F.3d 20, 28 (D.C.Cir.1998) (searching only the “main” file system was inadequate given other locations reasonably likely to contain responsive documents).

Any doubt about the adequacy of the search should be resolved in favor of the requester. Negley v. FBI, 658 F.Supp.2d 50, 59 (2009) (searching a single

database unreasonable). “A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.” Oglesby, 920 F.2d at 68.

In LaCedra v. Executive Office for United States Attorneys the requestor sought, “all documents pertaining to my case” under FOIA; in the same request he continued on by “specifically” requesting certain documents. 317 F.3d 345, 354-56 (D.C.Cir. 2003). The trial court agreed with the agency in finding it was only obliged under FOIA to search for the specific documents as opposed to all the documents pertaining to his case. Id. LaCedra overturned the trial court stating:

The first portion, “I wish to obtain a copy of all documents pertaining to my case,” is in considerable tension with the second, “Specifically I am requesting the following below.” Nevertheless, [plaintiff]’s request is reasonably susceptible to the broader reading. The drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof. We think it improbable, however, that a person who wanted only the subset would draft a request that, like [plaintiff]’s, first asks for the full set. The [defendant]’s interpretation - that the request for “all documents pertaining to my case that was prosecuted by your office” identifies the location where the subset of documents may be found - is simply implausible. In view of the Government’s

obligation under the law of this circuit “to construe a FOIA request liberally,” *Nation Magazine*, 71 F.3d at 890 we think it is also wrong.

Id. at 348. Thus, the agency impermissibly narrowed its search violating FOIA.

Here, for each request Mr. Mahmoud specified that, he was requesting “all emails sent to and from [various named individuals], including archived emails on the individuals C drive, P drive, or any other county network drive.” See, CP 48, 59, 67, 94 (emphasis added).

The County admits it did not search all its network drives for responsive emails despite Mr. Mahmoud’s specific requests to do so; rather, it only searched the email accounts of the named individuals. CP 1077-78. The County does not attempt to assert that it was particularly burdensome to search all its drives for the responsive emails.<sup>3</sup> Indeed, the County located and produced the responsive records in March 2012, thirty days after Mr. Mahmoud’s CR 34 requests. CP 418-971, 1129-37. It failed to ask Mr. Mahmoud to narrow his requests; it limited the searches unilaterally, without notice to Mr. Mahmoud. CP 1077-78.

It is undisputed that had the County searched the locations explicitly requested by Mr. Mahmoud then the additional responsive documents to the PRA

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<sup>3</sup> The County presented no evidence that it could not search all such drives for emails. Even if there was no easy way to search, the County was obliged to communicate with Mr. Mahmoud before limiting its search. WAC 44-14-04003(3)(7).

requests would have been discovered. CP 1639-40 (responsive emails were found in Mr. Mahmoud's email account); CP 1077 (all county email accounts are saved to the County server).

Clearly, given the mandate for broad disclosure under the PRA, as well as the holdings in Neighborhood Alliance, LaCedra and the other cases cited supra, the County's limited searches in response to each of Mr. Mahmoud's requests for emails under the PRA were inadequate and unreasonable as a matter of law.

Further, the County failed to carry its burden to establish that no violation of the PRA occurred. See, Oglesby, 920 F.2d at 68. It provided no affidavits stating all locations likely to contain responsive documents were searched. Indeed all likely locations to contain responsive documents were not searched, only specific emails accounts were searched, rather than searching emails accounts of other county employees who were likely recipients of emails requested.

The County also failed to follow obvious leads. Neighborhood Alliance further instructs that, under the PRA, an agency is required to follow obvious leads as they are uncovered. Neighborhood Alliance, 172 Wn.2d at 720. In Neighborhood Alliance, the Court ruled the county had a duty to follow the obvious lead and search all locations likely to contain responsive records, including the old hard drive; its failure to do so violated the PRA. Id. at 722.

Here, Mr. Mahmoud informed the County that responsive records were missing from its production. As to request No. 09-05375, he informed the County that its response “**does not** have most of the info I requested. There are only 24 emails from Max Phan from January 2008 to March 2009, no emails from Bruce Duvall, Max [sic] supervisor and no emails from Art Louie.” CP 1575 (emphasis in original). He even specifically stated he was renewing this request. Id. As to request No. #10-08592, Mr. Mahmoud questioned why no emails at all from three people over nearly four-months were located; in response, the County falsely opined they had been destroyed. CP 1605.

The County failed to follow up on these obvious leads and search all locations in which records would likely be located. CP 44-45. Indeed, despite specific instructions to include as part of the search “any other county network drive” the County admits it failed to do so. CP 1077-78. Had it searched all network drives, which included Mr. Mahmoud’s email account, it would have found the responsive emails as evidenced by the later produced documents. CP 1639-40 (responsive emails were found in Mr. Mahmoud’s email account); CP 1077 (all county email accounts are saved to the County server). Instead, the County failed to follow up on the leads at all.

Given that Neighborhood Alliance held an agency is required to search for

responsive records on a hard drive that been placed in storage, the County was thus required to search all likely locations when it became obvious that all responsive records had not been located. The County has failed to present any evidence that it searched all such locations or that such searches would have been more burdensome than the search mandated by Neighborhood Alliance

Additionally, beyond the fact the County immediately had a duty to search all network drives as requested, it had an affirmative duty to identify and search any other places the records were likely located. The County employee who conducted the searches claims that his process to extract individuals' emails copies all emails to or from that person. CP 1077-78. However, testimony from another County employee proves otherwise, as she personally located emails on a computer that were not located through the copy process. CP 1102. This further evidences the fact that there were more places responsive emails were likely to be found outside of the limited searches by the County's employee. The County thus again evidenced it unreasonably narrowed its search in violation of the PRA.

**B. The County's Exemption Logs Were Deficient and Violated the PRA**

To properly claim an exemption under the PRA, an agency must include the record's "number of pages" and "an explanation of how [the exemption] applies to the individual agency record." Rental Hous. Ass'n of Puget Sound v.

City of Des Moines (“RHA”), 165 Wn.2d 525, 538 (2009); Sanders v. State, 169 Wn.2d 827, 846 (2010) (finding the mere identification of a record and claimed exemption to be deemed as a “brief explanation” violates the PRA).

The trial court erred in finding the County’s claims for exemptions were proper. CP 1830. For each such claim, the County failed to: 1) explain how it applied to the withheld record; 2) provide sufficient information to determine if the exemption was applicable; and, 3) identify the number of pages withheld. CP 128-30, 399-402, 411-13, 415-16, 1564, 1593-95, 1600, 1614-19. The County does not dispute this. Thus, the trial court erred by finding the County’s claims did not violate the PRA.

### **C. The County Unjustifiably Delayed Production**

The Court erred in finding the County did not violate the PRA based on its unjustified delays in producing responsive emails. CP 1830. The PRA states an agency may provide a reasonable estimate by which it will respond to a request. RCW 42.56.52. After the estimate expires, “[a]n agency should communicate with the requestor that additional time is required ... [u]njustified failure to provide the record by expiration of the estimate is a denial of access to the record.” WAC 44-12-04003 (10). An unjustified failure to produce records in accordance with the estimates is a violation of the PRA. Violante v. King County

Fire Dist. No. 20, 114 Wn. App. 565, 570-71 (2002) (agency's failure to produce records 14 days after estimate lapsed violated PRA).

As to Requests No. 09-05375 and 10-01666, the County repeatedly failed to justify not meeting its estimate as to when the records would be available. CP 1566-69, 1583-90. It took over eight months from the initial requests to provide its final, yet incomplete responses. Id. The County produced no evidence to justify its failures to meet its estimates and timely produce the records. Id. Thus, with respect to these requests, the County violated the PRA by unjustifiably delaying production of responsive documents.

#### **D. The Trial Court Improperly Granted Reconsideration of a New Legal Theory**

“When an order is based on questions of law, the standard of review is de novo and not abuse of discretion.” Ramey v. Knorr, 130 Wn. App. 672 (2005), citing Schneider v. City of Seattle, 24 Wn. App. 251, 255 (1979). On December 19, 2012, the trial court denied the County's Motion for Partial Summary Judgment Re PRA Claims. CP 991-93. The County then moved for reconsideration under CR 59(a)(7). CP 999.

In support of its CR 59 motion, the County argued for the first time a new legal theory: the two-year SOL set forth in RCW 4.16.130 applies to Mr. Mahmoud's PRA claims. Compare CP 1003-05 with CP 31-41. The trial court

considered this theory and dismissed two PRA claims based thereon. CP 1055-57.

However, “CR 59 does not permit a [party] to propose new theories of the case that could have been raised before entry of an adverse decision.” Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241 (2005), citing JDFJ Corp. v. Int’l Raceway, Inc., 97 Wn. App. 1 (1999). Likewise, CR 59 does not permit the County to propose new assertions based on a new SOL defense. CR 59(a). Here, the County could have asserted this defense in its motion for partial summary judgment of November 1, 2012 but it failed to do so. As such, the trial court erred as a matter of law when granting the motion to reconsider and dismissing two of Mr. Mahmoud’s PRA claims based on the County’s new legal theory.

**E. The PRA SOL was Not Triggered as to Request # 09-05374**

The trial court also granted the County’s motion to reconsider and dismissed Mr. Mahmoud’s first PRA request, dated July 31, 2009, based on the PRA’s one year SOL. CP 1055-57. The PRA explicitly states the one-year SOL is triggered in one of two ways. RCW 42.56.550(6). First, an agency triggers the SOL by properly claiming an exemption. Id. Second, the SOL is triggered upon a last production of a responsive document on a partial or installment basis. RCW 42.56.550(6). Once the SOL is triggered, a claimant has one year to file a claim.

Here, the County admits it failed to produce a responsive document in

response to Mr. Mahmoud's PRA request. Thus, the only issue is whether the County's claim of an exemption triggered the PRA.

**1. How to Trigger the PRA SOL by Claiming an Exemption**

In RHA, the Court analyzed when a claim for an exemption under the PRA is sufficient to trigger the SOL. 165 Wash.2d at 536-41. After describing the sort of information deemed adequate to make a proper exemption under the PRA, RHA concluded that an agency's failure to provide such information:

was insufficient to constitute a proper claim of exemption and thus did not trigger the one-year statute of limitations under RCW 42.56.550(6) The City's August 17, 2005 reply letter did not (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....

Without the information a privilege log provides, a public citizen and a reviewing court cannot know (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 for an individual record. Failure to provide the sort of identifying information a detailed privilege log contains defeats the very purpose of the PRA to achieve broad public access to agency records. See RCW 42.56.030. In this regard, requiring a privilege log does not add to the statutory requirements, but rather effectuates them. See RCW 42.56.210(3).550(6).

Id. at 536-41.

## **2. The County's Exemption Claim Failed to Trigger the SOL**

In this case, the County similarly did not comply with the PRA when it claimed a categorical exemption in response to Mr. Mahmoud's PRA request:

The internal investigation mentioned in your request, records of which would be responsive to your disclosure request, is still being conducted. Documents responsive to your public records request, with the exception of the transcripts already provided to you by Mark Knudsen, are therefore exempt from disclosure at this time under the authority of RCW 42.56.250(5). That statute exempts from public inspection and copying:

Investigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment ....

If you have further questions about this request, please contact me via email or telephone at the contacts listed below.

CP 128-29. Just as in RHA, the County's response did not (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 categorically asserting the investigative process exemption as to all withheld documents.<sup>4</sup> Thus, just as in RHA, the County's response failed to trigger the PRA SOL and the trial court

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<sup>4</sup> The Washington Supreme Court recently declined to recognize a similar categorical exemption as proper under the PRA. Sargent v. Seattle Police Dept., -- Wn.2d -- (Wash. Dec. 19, 2013).

erred in dismissing Mr. Mahmoud's claim.

**F. The Two-Year SOL Under RCW 4.16.130 was not Triggered as to the Other PRA Requests Until March 2012**

As set forth above, although the trial court should not have considered the County's new legal theory that the SOL under RCW 4.16.130 applied to Mr. Mahmoud's PRA claims, it further erred by finding that the SOL barred two claims (Mr. Mahmoud's two renewals of his request under PRA #09-05374).<sup>5</sup> Assuming this Court should choose to analyze this issue, Mr. Mahmoud respectfully submits RCW 4.16.130 does not apply to bar Mr. Mahmoud's claims.

After the County made the inadequate exemption claim quoted just above, Mr. Mahmoud's former attorneys twice re-issued requests for the same records under the PRA in October 2009 and in February 2010. CP 132-33; CP 2434-38. The County failed to respond at all to these two requests: that is, it failed to claim an exemption or to produce a responsive record to either request. CP 418.

Thus, the County could not have triggered the PRA SOL. See, Tobin v. Worden, 156 Wn. App. 507 (2010) (holding that because the agency failed to properly claim an exemption and failed to disclose or produce a responsive record, the PRA SOL was never triggered); RHA, 165 Wn.2d at 536-41.

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<sup>5</sup> Mr. Mahmoud was required to re-new his PRA requests for these records because the PRA does not provide for "standing" requests. See, Sargent v. Seattle Police Dept., 167 Wn. App. 1, 10-12 (2011), aff'd in part, rev'd in part, -- Wn.2d -- (Wash. Dec. 19, 2013).

Instead, in granting reconsideration and dismissing the two claims, the trial court relied on a Division II case that appears to be the only case that has applied the two-year RCW 4.16.130 SOL catch-all to bar a PRA claim. Johnson v. State Dept. of Corrections, 164 Wn. App. 769 (Div. 2. 2011).

Johnson is inapplicable as it holds that once the *entirety* of the responsive records is produced by an agency, then, at a minimum, the SOL under RCW 4.16.130 is triggered. Id. at 778, f/n 11 (noting that, “the record does not show that when Johnson made his request...the DOC had possessed any responsive documents other than the single one-page record it provided to him at that time.”)

Here, the County cannot dispute that it failed to respond at all to the two PRA requests.<sup>6</sup> CP 132-33, 418, 2434-38. The County also cannot dispute that it possessed responsive records at the time of the requests. See, e.g., CP 501-36. It is clear the County silently withheld such records in violation of the PRA.

Thus, even if the two-year SOL under RCW 4.16.130 does apply to the claims, it should be tolled until March 2012 when Mr. Mahmoud discovered the responsive records. See, Reed v. City of Asotin, 917 F.Supp.2d 1156 (E.D. Wash. 2013) (holding that the “discovery rule” tolled the SOL under RCW 4.16.130

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<sup>6</sup> Indeed, Mr. Mahmoud never heard back from the County at all in response to the October 2009 and February 2010 PRA requests although he was separately informed that the investigation had concluded in March 2010. CP 987. In any event, he did not discover the responsive records until they were produced in discovery in March 2012. CP 418.

until the records were discovered).

**G. This Court Should Award Mr. Mahmoud Reasonable Fees and Costs Pending Remand**

The PRA awards the prevailing party “all costs, including reasonable attorney fees.” RCW 42.56.550(4). Fee awards are reviewed for abuse of discretion. Sanders, 169 Wn.2d at 866-67 (2010). Discretion is abused where the decision is “manifestly unreasonable” or based on “untenable” reasoning. Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 458–59 (2010).

The trial court abused its discretion when it ordered \$18,055 in fees to Mr. Mahmoud. It provided no indication as to which entries to compensate or the number of hours compensated, nor did it indicate the reasonableness of counsels’ billable rate. CP 2115-18. The only explanation provided was a single sentence stating, “the Plaintiff’s attorney [sic] has not segregated those fees attributable to the successful claims from those attributable to claims which were not successful.” Id. The award is manifestly unreasonable for several reasons.

First, it appears the trial court based its award on the County’s argument that since Mr. Mahmoud prevailed on one of seven possible PRA claims, he should receive only 1/7<sup>th</sup> of his fees. Such a strict pro-rata share based on the number of possible PRA claims has been rejected by our state Supreme Court.

Instead, it has provided a different approach to awarding fees with both successful and unsuccessful PRA claims. Sanders, 169 Wn.2d at 865-68.

After reviewing the issues, Sanders found the State prevailed on the most important issue and Justice Sanders only prevailed on five percent. Id. at 868. However, Sanders affirmed awarding 37.5 percent of the total fees incurred. Id. Sanders thus rejected a pro rata allocation and affirmed awarding greater fees recognizing that, “there were economies of scale involved, such that it was fairer to award Justice Sanders 75 [percent] of the fees allocated...” Id. at 866.

Here, a pro-rata share is similarly unjust as most if not all issues overlapped and the work performed in pursuing the claims on which Mr. Mahmoud did not prevail was also required for the prevailing claim. For example, there was substantial litigation regarding an SOL defense as to each claim. CP 31-987, 997-1054. This issue required extensive preparation, analysis, and motion practice with the same or similar arguments presented for each claim. Id. Whether Mr. Mahmoud prevailed on one or all such claims, that work was necessary. CP 1862-63. As described in Sanders, “there were economies of scale involved.” Sanders, 169 Wn. 2d at 866. Further, Mr. Mahmoud voluntarily dismissed one of the PRA claims early on, with little to no work performed on that claim. CP 988-90, 1862. As such, an across the board 1/7<sup>th</sup> fee award is manifestly unreasonable.

Second, even though the County argued to award 1/7<sup>th</sup> of the fees, it conceded an award between \$36,547.24 and \$39,571.24 was reasonable. CP 1940. The Court awarded less than half of that amount. CP 2117.

Third, Mr. Mahmoud had reduced his fee request to account for his lack of success on the six PRA claims. He only sought a fraction of such fees. CP 2084-85. The amount sought, \$126,385, had already been voluntarily reduced from \$194,240. CP 1991-92, 2084. However, the trial court further reduced the fee award by awarding only 1/7<sup>th</sup> of the reduced amount ( $\$126,385 / 7 = \$18,055$ ). CP 2116-18. This results in a double reduction for the unsuccessful claims.

Finally, even when the fees were completely segregated as to the prevailing claim, the trial court failed to award them or provide a rationale for this failure. On April 17, 2013, the trial court dismissed all but the prevailing claim.<sup>7</sup> All the fees requested for work after that date, \$33,171, was performed solely on the prevailing claim.<sup>8</sup> CP 1998, 2085.

Because the trial court abused its discretion, Mr. Mahmoud requests this Court to remand for a determination as to his reasonable fees to be awarded. Further, he requests attorneys' fees and costs to the extent he prevails on this

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<sup>7</sup> On December 20, 2012, Mr. Mahmoud voluntarily dismissed a PRA claim. Very little, if any, work was performed specifically on this particular claim. CP 1862.

<sup>8</sup> Mr. Mahmoud is not seeking to recover the 21.2 hours spent on a motion to reconsider the order from the Show Cause hearing dismissing four PRA claims. CP 1862.

appeal. RAP 18.1; Progressive Animal Welfare Soc'y, 125 Wn.2d at 271.

## V. CONCLUSION

Mr. Mahmoud respectfully requests the Court enter an order reversing the trial court as follows:

As to PDRs #09-05375, #10-01666, #10-08592, and #10-08593, the County did not perform reasonable searches under the PRA as a matter of law.

As to PDRs #09-05375 and #10-01666, the County violated the PRA as a matter of law when it failed to justify its delays in producing records.

As to the County's exemption claims for PDRs #09-05374, #09-05375, #10-01666, #10-05383, and #10-08593, such claims were insufficiently detailed under the PRA as a matter of law.

As to Mr. Mahmoud's first request under PDR #09-05374, the one-year statute of limitations under the PRA was not triggered. Further, the catchall statute of limitations should not have been considered on reconsideration; regardless, it does not bar the PRA re-requests for the same records under PDR #09-05374.

To the extent Mr. Mahmoud prevails on any of the above claims on appeal, the Court should remand to determine the penalty amount as to such claims, as well as additional attorney's fees and costs.

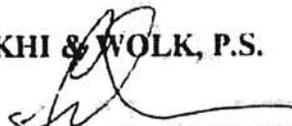
Mr. Mahmoud also requests this Court to find the trial court abused its discretion when it applied a strict pro-rata reduction on his already reduced

request for attorney's fees. As such, this Court should award reasonable attorney's fees and costs or in the alternative remand for a redetermination.

Finally, Mr. Mahmoud requests an award for all attorney's fees and costs associated with bringing this appeal.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of January, 2014.

**REKHI & WOLK, P.S.**

By:   
\_\_\_\_\_  
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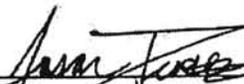
**CERTIFICATE OF SERVICE**

I, Jason Proctor, certify that a copy of the foregoing **BRIEF OF APPELLANT** was caused to be electronically served (through the consent of opposing counsel) on January 2, 2014, to the following counsel of record at the following email addresses:

*Counsel for Defendant/Respondent Snohomish County*  
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The foregoing statement is made under the penalty of perjury under the laws of the United States of America and the State of Washington and is true and correct.

DATED this 2<sup>nd</sup> day of January, 2014.

By:   
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