71425-2

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No. 71425-2

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

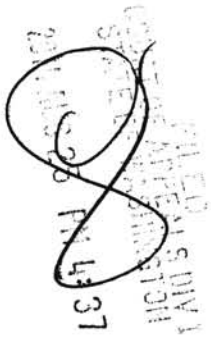
ANNE BLOCK,

Appellant,

vs.

THE CITY OF GOLD BAR

Respondent.



BRIEF OF RESPONDENT

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I. INTRODUCTION

The trial court granted the City's motion for summary judgment and denied Block's motion for summary judgment on her underlying Public Records Act claims. Summary judgment is wholly applicable in a Public Records Act case. In the proceedings below, Block offered only speculation and conjecture, and failed to provide the admissible facts necessary to survive the City's motion or to prevail on her own. The City's uncontroverted evidence, which is entitled to a presumption of good faith, establishes the absence of any genuine dispute of material fact. The trial court properly granted the City's motion for summary judgment and properly denied Block's motion.

II. RE-STATEMENT OF THE ISSUES

A. Whether the trial court properly dismissed on summary judgment Block's claims that the City violated the PRA where:

1. The City performed an adequate search of all places where records were reasonably likely to be found?
2. The City's exemption logs fully and adequately described the records withheld or redacted and additionally explained the bases for all exemptions?

3. The City established that all records fully withheld from disclosure were exempt under either or both the attorney-client and attorney work product privileges?
4. The City established that all records partially withheld from disclosure were properly redacted pursuant to either or both the attorney-client and attorney work product privileges?

B. Whether Block is entitled to attorneys' fees where she has not prevailed before the trial court or before this Court on any principal or other issue?

III. RE-STATEMENT OF THE CASE

This lawsuit involves the City's responses to two public records requests received from attorney Anne K. Block ("Block")[1], one on December 8, 2008 and the other on February 13, 2009. This lawsuit and its related predecessor marked the beginning of Block's relentless attacks against Gold Bar. Gold Bar is a small city in Snohomish County with very limited financial resources, and the City's financial status has materially worsened due to Block's misguided and wholly unsuccessful crusade against the City and its elected officials. CP 249-250.

During the period in which the City responded to the public records requests ("PRRs") at issue here, Gold Bar City Hall operated with

[1]At all relevant times, Block had been an attorney licensed to practice in Washington.

old computers and outdated technology. The City operated a "Peer-to-Peer" network with no central location for any of its data. Users were required to remember which data was stored on which machine. The City did not own an e-mail server. CP 247. City officials at times accordingly used personal e-mail accounts to conduct City business. CP 246.

In an effort to upgrade its technology, the City retained in September 2008 Michael Meyers of Eastside Computers Inc. ("Meyers"). The City asked Meyers to build a server and computers to replace aging equipment and to configure a domain-based network designed to centrally locate all City related documents, to facilitate future digitization of existing paper records, and to eventually activate Microsoft Exchange in order to manage and host all City e-mail. CP 247-248. Even after the new server system was operational, however, periodic technical problems persisted over the next few years. CP 248-249.

A. The December 2008 PRR.

In July of 2008, the City of Gold Bar terminated Karl Majerle ("Majerle") from employment with the City. After Majerle filed a tort claim and threatened further litigation, the City hired attorney Eileen Lawrence ("Lawrence") to defend the City. The parties ultimately entered into a written settlement agreement. CP 200-201.

On December 8, 2008, several months after Majerle's termination, Block submitted the first PRR at issue in this suit, to which the City assigned number GB 120908 (the "December 2008 PRR"). In her request, Block sought:

> ... ALL documents pertaining to the Karl Majerle alleged theft, which shall include all city investigative files, any settlement agreements made by any City of Gold Bar official, any emails regarding Marjerle [sic], the amount of taxpayers' money used to pay off Karl Majerle, and where the financial resources came from to pay off Karl Majerle.
>
> In addition, I am also seeking a copy of all the City of Gold Bar's insurance policies and copies of all insurance claim application(s) made as a result of the Karl Majerle alleged theft. . . .
>
> Answering public records requests are not optional.

CP 215. On December 12, 2008, the City sent a "five-day letter"[2] to Block which provided a response date of January 23, 2009 and explained the basis for the response period. CP 216.

During December of 2008 and January of 2009, Gold Bar and the surrounding region experienced significant snow and flooding emergencies. A state of emergency was declared by both the state and

[2] RCW 42.56.520.

federal governments, first for the snow event, and then separately for the flooding event. All five City staff members were directed to focus their energies on maintaining basic services (e.g., access to and maintenance of the City's drinking water wells) and keeping the main roads plowed for emergency vehicle access, rather than respond to PRRs. CP 187-191, 202-204.

Despite the emergency conditions affecting all of the residents of Gold Bar and the surrounding area, Block was dissatisfied. Block e-mailed the Governor (and the Snohomish County Executive, other local elected officials, and a news organization) to complain that the street on which she lived had not been plowed. CP 190.

Once the emergency conditions subsided, the City resumed processing Block's PRR. The City Clerk searched for records on the City's server and at City Hall. Then-Mayor Crystal Hill ("Hill") searched through her e-mail account using a variety of search terms. The City also gathered records from attorney Lawrence and from the City's insurance carrier. CP 170-171, 202-204.

On January 23, 2009, the City notified Block that, due to the snow and flooding emergencies, additional time was needed to process her request, and provided a new response date of February 27, 2009. CP 191-192, 203-204, 217.

Block remained dissatisfied. On January 24, 2009, Block responded:

> I gave you ample time to comply with my simple PDRs [Public Disclosure Requests], requested on 12/9/08. Your first letter dated 12/20/08 is identical to your last letter, and that was also late. I could care less about the weather, holidays, etc., just days of the week to me. As a Gold Bar citizen, I have an interest in fighting corruption, and if I did not make myself clear in the past, I believe that Ms. Hill is corrupt and I intend to scrutinize her every action.
>
> You have until the original date of January 27th to hand over PDRs.

CP 290. On January 26, 2009, the City Clerk spoke with Block by telephone. Block, as ever dissatisfied, again announced that she would sue the Mayor and the City if she did not receive the records by January 27. CP 291. The City continued to process Block's request in the manner described in the City's letter of January 23, 2009.

On February 13, 2009, after the then-City Attorney reviewed the responsive records and provided her legal advice to the City regarding privileges, exemptions, and redactions properly applicable to the December 2008 PRR, the City sent third-party notification[3] to Majerle advising that the City intended to provide the documents to Block unless

[3] Third-party notification is expressly authorized in PRA cases under RCW 42.56.540.

he obtained an injunction by February 26, 2009. CP 169, 191-192, 204, 218.

Block remained dissatisfied. Predictably, and also on February 13, 2009, Block filed a lawsuit under Snohomish County Cause No. 09-2-02891-3 ("Block I") alleging the City improperly responded to her November 28, 2008 request for a specified letter (the requested letter has never existed[4]) and to her December 8, 2008 request for the Majerle records. CP 169-170, 191-192, 204. Block voluntarily dismissed Block I in 2010 after the City moved for summary judgment. CP 308-309.[5]

B. The February 2009 PRR.

On that very same day (February 13, 2009), Block made yet another public records request, to which the City assigned number GB 021309 ("February 2009 PRR"). The February 2009 PRR sought, in relevant part:

> (ii) All records created or received by the City of Gold Bar, including but not limited to, all correspondence, email, internal memoranda and notes, relating to the City's efforts to respond to Ms. Block's request for public records dated December 8, 2008.

---

[4] CP 185-187.

[5] Block reasoned, "We have decided that it is cheaper and easier to simply dismiss the 2009 lawsuit rather than respond to [the City's] pending [summary judgment] motion. . . . [The City's] pending motion was the first time that the City actually bothered to explain why a document that was specifically mentioned in an email dated August 6, 2008 did not actually exist." CP 306-307. Block's reasoning was sheer fantasy – the City had provided its explanation on multiple previous occasions. *See, e.g.*, CP 198-200, 214.

> (iii) All records created or received by the City of Gold Bar, including but not limited to, all correspondence, email, internal memoranda and notes, relating to any notice provided to Karl Majerle regarding Ms. Block's request for public records dated December 8, 2008, and/or any response from Karl Marjerle.
>
> (iv) All records responsive to Ms. Block's request for public records dated . . . December 8, 2008.

CP 513-515. On February 18, 2009, the City Attorney responded and provided a response date of February 27, 2009 (the same response date previously provided to Block for her December 2008 PRR). CP 169-170. On February 23, 2009, the City Attorney informed Block's attorney that the records responsive to the December 2008 and February 2009 PPRs were ready for delivery to Block on February 27, 2009, unless Majerle successfully obtained an injunction. CP 251, 292-294.

On February 27, 2009, the City provided to Block the records and exemption logs responsive to both the December 2008 and February 2009 PRRs. CP 170.

C. Subsequent Upgrade of City's Technological Capability.

Hill resigned as Mayor of Gold Bar in June 2009. Joe Beavers, then a member of the City Council, was appointed to fill the vacancy in the Office of the Mayor. CP 243. Mayor Beavers had a background in document automation, and made a decision to upgrade the City's

technological capability in order to enhance the City's ability to search for and provide public records to Block and other requestors. CP 246-247.

After Meyers built the new server described above, the City installed a full Microsoft Exchange server to control all of the City's e-mail. The City hired a paralegal specifically to help process PRRs in August of 2009. Around this same time, the City replaced three old computers at City Hall. CP 247-250.

In January of 2010, and for the first time, the City had the technology to process PRRs in electronic format. The City re-released some non-exempt Hill e-mails in PST format using the improved computer system and software. Over the next year, additional research revealed improved search functions available in more recent versions of Microsoft Office products. The City upgraded the entire system to new Office products in mid-2010 and again in late 2010 or early 2011. CP 248-249.

The complete technology upgrade was finalized toward the end of 2011, and "work continues on improving the City's PRR technical response." CP 249. The improvement to the City's computer system and related search capability was illustrated immediately. For example, using the same search terms, a search that had initially retrieved only fifty e-

mails produced approximately nine hundred e-mails after the technology upgrade. Id.

While the City's substantial expenditures for technological upgrades and legal fees to review and redact public records had greatly enhanced the City's ability to respond to PRRs, those efforts had also come "at a severe cost to other essential City government services." CP 249-250. As a "direct result" of the cost to respond to Block's multiple PRRs and associated wholly unsuccessful litigation, the City budgets for 2011, 2012, and 2013 reflect reduced spending for police, streets, stormwater, and parks. CP 250

D. Block Files in Superior Court.

Block filed the instant action in February 2010. After only limited discovery in June 2010, deposing the former City Clerk in March 2012 and then receiving a notice of dismissal for want of prosecution in June 2012, Block moved for partial summary judgment on July 9, 2013. CP 590-612, 635-636. Block's motion also sought *in camera* review of 29 pages of e-mails redacted under the attorney-client privilege, contending that the e-mails may evidence "the City's efforts to identify, gather, and produce responsive records" and speculating that such communications were not "legal advice." CP 607-611. The City filed a cross-motion for summary judgment. CP 313-443. On August 23, 2013, the trial court

granted Block's motion for *in camera* review, but reserved ruling on the cross-motions for summary judgment until after review of the redacted e-mails. CP 35-37.

On October 2, 2013, the Court granted the City's Cross-Motion for Summary Judgment, and denied Block's Motion for Partial Summary Judgment. The Court's order explicitly noted, "Some of the records [reviewed *in camera*] contain information regarding the search for records responsive to Block's PRRs, but in the context of attorney communications." CP 4-7.

Block remained dissatisfied. After unsuccessfully moving for reconsideration, this appeal predictably followed.

IV. ARGUMENT

A. Standard of Review on Appeal.

Appellate review of a trial court's decision to grant summary judgment is de novo. An appellate court engages in the same inquiry as the trial court, which is to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997) (*quoting* CR 56(c)). A material fact is one on which the

outcome of the case depends. Atherton Condo. Ass'n. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

B. Burden of Proof on Summary Judgment.

In the proceedings below, the parties brought cross-motions for summary judgment under CR 56. The trial court granted the City's cross-motion for summary judgment and denied Block's motion for partial summary judgment.

Block did not move for a statutory show cause hearing under RCW 42.56.550 at which the statutory burden would have been on the City, nor was a show cause hearing otherwise held.

Block's entire opening brief ("Block Brief") is based on the mistaken premise that the burden of proof always rests with the agency in a PRA action. Nothing in the PRA changes Block's burden on her motion for summary judgment. CR 56 remains fully applicable in a PRA case.

"The Rules of Civil Procedure apply in a PRA action." City of Lakewood v. Koenig, 160 Wn. App. 883, 889, 250 P.3d 113 (Div. II 2011). This specifically includes summary judgment, which "procedure is also a proper method to prosecute PDA [formerly, Public Disclosure Act] claims. . . . [A] show cause procedure is discretionary, not mandatory." Spokane Research and Defense Fund v. City of Spokane, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005). Block moved for summary judgment as a

plaintiff. The burden was on her to prove the absence of any genuine issue of material fact.

In cross-moving for summary judgment as a defendant here, the City bears that same initial burden. Gold Bar permissibly satisfied its burden, however, simply by challenging the sufficiency of Block's evidence as to any material issue. Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992). In other words, Gold Bar was not obligated even to present affidavits, deposition testimony, or other evidence to meet its initial summary judgment burden. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), *followed in* Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989).

As the Celotex Court counseled with respect to Block's motion, "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. And, equally importantly with respect to the City's motion, "In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a

summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. at 324.

Of additional importance in this case is the decision of this Court in Forbes v. Gold Bar, 171 Wn. App. 857, 288 P.3d 384 (Div. I 2012). In another in the long string of wholly unsuccessful challenges brought by Block and her cabal of followers against Gold Bar and its duly elected officials (CP 244), this Court instructed, "Purely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit which is accorded a presumption of good faith." Forbes, 171 Wn. App. at 867.

The purpose of summary judgment is to "avoid a useless trial," and to determine "whether evidence to sustain the allegations in the complaint actually exists." Almay v. Kvamme, 63 Wn.2d 326, 329, 387 P.2d 372 (1963). Block's speculation is not enough:

> [P]laintiff's equation of 'unanswered questions' with 'genuine issues of material fact' belies a perhaps too frequently held misconception of the nature of the summary judgment procedure. It is true that the burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact, and that all reasonable inferences from the evidence must be resolved against the moving party. However, this does not mean

> that the party moving for summary judgment is compelled to meet every speculation, conjecture or possibility by alleging facts to the contrary.

Bates v. Grace United Methodist Church, 12 Wn. App. 111, 114-115, 529 P.2d 466 (Div. II 1974) (internal citations omitted). *See also* Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 795, 64 P.3d 122 (2003).

Block's burden on summary judgment does not change by virtue of the fact that this is a PRA case. This very issue is specifically addressed in the PRA case of BIAW v. McCarthy, a case repeatedly cited in Block's briefing below but wholly unaddressed in her Brief of Appellant:

> The moving party bears the initial burden of showing the absence of an issue of material fact. If a defendant movant meets this burden, the plaintiff must respond by making a prima facie showing of the essential elements of its case. The plaintiff cannot rely on allegations in the pleadings or assertions, but must present competent evidence by affidavit or otherwise. . . .
>
> BIAW contends that by bringing a summary judgment motion, the County improperly shifted the burden to BIAW. BIAW urged the trial court to deny the County's summary judgment motion and instead proceed to a show cause hearing at which the County would bear the burden of proof as to why it failed to disclose any requested documents. However, there was no improper burden shifting here.
>
> BIAW contends that the presence of several material fact questions concerning whether

> and how the auditor's office uses emails render summary judgment improper. However, the County's affidavits answer those questions (i.e. they describe office practices, when and how emails are used or not used, and what happened in this particular circumstance) and those affidavits are unrefuted. As the trial court correctly ruled, to avoid summary judgment, in answer to the County's affidavits, BIAW had to present the court with "facts ... not just mere speculation, not wishes, not thoughts, but facts that would be admissible at trial." Because BIAW did not do so, summary judgment was proper.

BIAW v. McCarthy, 152 Wn. App. 720, 735-736, 218 P.3d 196 (Div. II 2009) (emphases added; internal citations omitted).

Plaintiff Block offered no admissible factual evidence that would demonstrate a PRA violation by the City. Even though the defendant City was not obligated under Las, *supra,* and Celotex, *supra*, to submit declarations or other factual evidence, it did so -- the declarations and deposition testimony of former Mayors Crystal Hill and Joe Beavers and former City Clerk Laura Kelly (CP 60-89, 184-196, 197-231, 243-312) provide substantial evidence of the reasonableness of the City's search for records at the time of the PRRs. The City's unrefuted declarations are "accorded a presumption of good faith." Forbes, 171 Wn. App. at 867.

C. The City Adequately Searched for the Requested Records Using the Technology Available to It at the Time.

Block argues that because she "has proven the existence of several responsive records that existed on the date of her request [and] were not identified or produced to her by the City," she therefore "need not show whether or not the search was reasonable." Block Brief at 25-26.

The applicable standard is not whether subsequently discovered responsive documents did in fact exist at the time of the PRR. Rather, the applicable standard is whether the City, using its available technology, conducted an adequate search at the time of the PRR.[6] As this Court made clear in a previous case involving Block, that time as counsel for her close ally, Susan Forbes,[7] "The focal point of the judicial inquiry is the agency's search process, not the outcome of its search." Forbes, 171 Wn. App. at 866 (citing to Trentadue v. FBI, 572 F.3d 794, 797-98 (10th. Cir. 2009) (citations and quotations omitted)).

1. Block's claimed evidence includes records that are non-responsive to her PRRs.

In her Brief at page 13, Block specifically points to two e-mails as evidence of a PRA violation. CP 363-364. Neither e-mail mentions the alleged Majerle theft or subsequent investigation or litigation – the actual

[6] The City has summarized the specific records about which Block complains, and the City's related responses. CP 351-354.
[7] CP 244.

subjects of Block's PRRs. CP 473, 513-515. No PRA violation exists for failure to produce non-responsive records.

2. The City's search for responsive records was far more than legally adequate. The fact that other agencies had additional records is immaterial.

The production by other agencies to Block of certain records not initially located or produced by Gold Bar is immaterial to the applicable legal standard:

> [T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. 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. What will be considered reasonable will depend on the facts of each case. When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found.

Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn. 2d 702, 719-720, 261 P.3d 119 (2011). An agency need not search every place for responsive records, "but only those places where [responsive records are] reasonably likely to be found." Id. *See also* Forbes, 171 Wn. App. 857.

To that end, the City Clerk searched the City's server and paper files, other City personnel and legal counsel with direct knowledge of the

events searched their e-mails, and the former Mayor thoroughly searched her e-mails. CP 168-170. Once Gold Bar received the February 2009 PRR, Hill instructed the City Clerk and City Attorney to again search for records responsive to the December 2008 PRR. CP 170. Hill repeated the search of her own e-mails as well. Id.

At the time of the PRRs and related searches for records, however, the City's e-mail search function was technologically limited for both the City's e-mail and the Mayor's personal e-mail account. For example, the City's technological capabilities to conduct e-mail searches would yield only a fraction of the records located after the City subsequently purchased upgraded technology. CP 247, 249. Moreover, several of the e-mails about which Block now complains do not even mention "Majerle" or other terms that would reasonably be used in a search for records responsive to Block's PRRs. CP 351-362.

At the time of Block's PRRs, the AOL e-mail system used by former Mayor Hill only permitted searches of e-mails themselves, and not attachments to e-mails (CP 171), and Hill and other AOL users often experienced inadvertent and unexplained losses of data. CP 171, 173-183.

Block offers absolutely no contrary evidence. None.

Hill's declaration reflects her *personal knowledge* regarding the manner in which she searched, and directed others to search, for

responsive records. Block nonetheless claims that "there is no evidence that the City or Hill even tried to retrieve or produce [] e-mails from Hill's email account or from her Blackberry before the City responded on February 27, 2009," citing a January 15, 2009 e-mail as "proof." Block Brief at 23. That e-mail states in part that "[t]hose would *also* be in Eileen Lawrence's docs," which actually further proves the adequacy of the City's search by demonstrating that the City searched Lawrence's files *in addition* to Hill's files.

The appellate courts have specifically rejected claims like those offered by Block here. *See* BIAW, 152 Wn. App. 720, and West v. DNR, 163 Wn. App. 235, 258 P.3d 78 (Div. II 2011). For example, in BIAW, after Pierce County responded to BIAW's records request with certain responsive documents, BIAW claimed the fact that BIAW had obtained a responsive e-mail from another source as proof that the County had impermissibly withheld records.[8] BIAW accordingly claimed the mere existence of the previously obtained records constituted proof of a PRA violation by Pierce County. In response, the County again unsuccessfully conducted a search, acknowledging that it "more probably than not"

[8] The Court's decision in BIAW does not identify when or how the requestor obtained the responsive e-mail.

deleted the records due to a lack of retention value as determined under the State Archivist's schedules.

BIAW produced no evidence that the County had unlawfully deleted the records at issue. The Court accordingly found that Pierce County had not violated the PRA by failing to provide the e-mail, recognizing:

> [J]ust as the act "does not provide a 'right to citizens to indiscriminately sift through an agency's files in search of records or information which cannot be reasonably identified or described to the agency,'" the act "does not authorize indiscriminate sifting through an agency's files by citizens searching for *records that have been demonstrated not to exist*."

BIAW, 152 Wn. App. at 734-735 (emphasis in original) (internal citations omitted).

Similarly in West, *supra*, the plaintiff requested all e-mails from a Department of Natural Resources ("DNR") official over a two-year period. DNR admittedly did not provide all of the e-mails from one of the years in question. Like Gold Bar, DNR had subsequently upgraded to a new email system, hired an outside IT consultant, and "made 'a significant expenditure of time and resources' in their efforts to recover the emails." Even so, DNR's efforts were ultimately unsuccessful in locating the requested records. West, 163 Wn. App. at 240. The plaintiff then brought

an action alleging that DNR had improperly and unlawfully destroyed public records.

The Court found that DNR did not violate the PRA by failing to produce irretrievable records. Citing to BIAW, the Court held:

> Here, there was "'no agency action to review under the Act' where the agency did not deny the requestor an opportunity to inspect or copy a public record, because the public record he sought 'did not exist.'"

Id. at 245.

Block claims that the trial court should have deferred its consideration "until after discovery could be conducted into exactly what steps had been taken to search for records – efforts that were obstructed here due to the City's claim of privilege for virtually all records and communications showing such efforts." Block Brief at 26.

Block filed this case on February 2, 2010. CP 624-634. The trial court granted the City's motion for summary judgment on November 14, 2013, nearly four years later, during which time Block had ample time to conduct discovery. CP 4-7. Even more damning to Block's argument here, Block's deposition of the then-City Clerk included *specific* questions regarding the City's search efforts:[9]

[9] As discussed in further detail below, the City permissibly "obstructed" Block's attempts only to the extent that she impermissibly sought disclosure of privileged legal advice provided by the City's then-attorneys.

> Q. And you – where did you expect Crystal Hill to have emails that you were looking for?
> KELLY: From her email account.
> ...
> Q. How many emails were there?
> KELLY: I don't know how many emails. Just anything that regarded Karl.
> Q. And what did Mayor Hill say?
> KELLY: That she would get them to me.
> Q. Did she ever do that?
> KELLY: Yes, she did.

CP 72-73, ll. 20-22, 3-9.

> Q. ... Prior to sending [the response date extension letter], did you ask Crystal Hill if she had checked for emails in her AOL account?
> KELLY: Yes.
> Q. And what did she say?
> KELLY: That she was in process of reviewing again.
> Q. Had she produced anything up to that point?
> KELLY: Yes.

CP 80, ll. 9-16.

> Q. What were the different places that you would look for the responsive documents?
> KELLY: For these, because [Block is] asking about finances, I would have gone to my financial accounting system. I would have also gone to [Majerle's] payroll records and I would have gone to his employee file.
> Q. Did you search your own computer?
> KELLY: Yes.

CP 71, ll. 6-13. Further, the City also repeated the search to better ensure that all of the responsive documents had been collected:

> Q. What were you doing to ensure that you had all the records?
> KELLY: Doing another search to make sure that the records had been received.
> Q. Where did you search?
> KELLY: I searched my own personal emails, and then requested that Crystal [Hill] and John [Light] search their emails.

CP 79, ll. 11-17.

The uncontroverted facts before the trial court confirm that the City's search, at the time of the records request, was reasonably calculated to locate all responsive documents.

D. The City's Exemption Logs Fully Describe Withheld and Redacted Documents.

Block next argues that the City violated RCW 42.56.210(3) by failing to adequately explain how the exemptions for attorney-client and attorney work product privileges applied to particular records.[10] Under RCW 42.56.210(3), an agency withholding a record in whole or in part is required to "include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld."

The required "statement of the specific exemption" is usually included in an exemption log. Rental Housing Ass'n of Puget Sound v.

[10] Block also argues for the first time on appeal that the City improperly used the "draft" exemption under RCW 42.56.280. Block did not raise this argument before the trial court. See CP 590-612. "Issues not presented to the trial court will not be heard for the first time on appeal." Jones v. Stebbins, 122 Wn. 471, 479, 860 P.2d 1009 (1993).

City of Des Moines ("RHA"), 165 Wn.2d 525, 538-538, 199 P.3d 393 (2009) (*citing* WAC 44-14-04004(4)(b)(ii)). An exemption log passes muster as long as it contains sufficient information to identify the records without disclosing privileged content. Progressive Animal Welfare Soc. v. University of Washington ("PAWS II"), 125 Wn. 2d 243, 271, 884 P.2d 592, 95 Ed. Law Rep. 711, n. 18 (1994).

"The log should include the type of information that would enable a records requester to make a threshold determination of whether the agency properly claimed the privilege." Gronquist v. Washington State Dept. of Licensing, 175 Wn. App. 729, 744, 309 P.3d 538 (Div. II 2013) (citations omitted). The City's exemption logs, prepared separately for the December 2008 PRR and the February 2009 PRR, fully satisfy the applicable standard especially where, as here, the "records requester" was at the time a licensed and actively practicing attorney, and accordingly familiar with the attorney-client and attorney work product privileges. Even the most cursory review of the City's detailed exemption logs quickly enabled attorney Block (and her retained counsel) to make the "threshold determination" that Gold Bar "properly claimed the privilege."

The cases cited by Block are easily distinguished. First, Block cites to Citizens for Fair Share v. State Dept. of Corrections, but the agency in that case did not provide *any* explanation or exemption log

whatsoever for withheld records. 117 Wn. App. 411, 431, 72 P.3d 206 (2003). Block also cites to RHA, *supra*, but the RHA Court did not address at all the statutory adequacy of the agency's exemption logs. Rather, the issue in RHA was the trigger date for the statute of limitations, and the RHA Court simply examined "when a 'claim of exemption' under RCW 42.56.550(6) is effectively made" for the purpose of triggering the one-year statute of limitations. RHA, 165 Wn.2d at 537.

Block heavily relies on Sanders v. State, but Sanders offers no help to Block. 169 Wn.2d 827, 240 P.3d 120 (2010). In Sanders, the Court reviewed the State's bare exemption log, and understandably concluded that "[a]llowing the mere identification of a document and the claimed exemption to count as a 'brief explanation' would render [the PRA's] brief-explanation clause superfluous." Id. at 846.

The City agrees. The exemption logs originally offered in Sanders *do* fail to provide the statutorily-required "brief explanation." CP 254-289. As the Sanders Court noted, the State claimed the "controversy" exemption[11] without identifying the controversy to which each record applied. Sanders, 169 Wn.2d at 846.

The Sanders exemption log included vague entries that provided little or no information about specific records or applicable exemptions.

[11] RCW 42.56.290.

For example, document TF-00074 – TF-00079 describes the document as merely an "Email with Attachment(s)" from "02/27/2003" entitled "FW: Memo re Justice Sanders Recent SCC Visit" with a list of the "to", "from", and what appears to be the "Ccs".[12] CP 256. The State's exemption log does not describe the attachments with any specificity. Under the column entitled "Privilege", presumably the column reserved for the exemption's statutory authority and brief explanation, the log merely states "RCW 42.17.310(1)(j)." In short, the State's log failed to include the statutorily required "brief explanation" of the applicability of the claimed exemptions – it merely cited to the statute itself.

By contrast, the City's exemption logs here fully comply with the statutory requirements. CP 428-438. The City's logs include detailed descriptions of the documents. For example, "handwritten notes on email pages re Majerle v. City of Gold Bar," "email/letter from [Lawrence] to [Hill] RE Majerle v. Gold Bar Analysis of conversation with Brian Dale Majerle's Attorney," and "handwritten note of City Insurance Defense Attorney Eileen Lawrence (phone calls, case strategy, analysis, research, meetings)." CP 429-432. The City's logs cite to the statutory exemption and applicable case law, and also include the required "brief explanation"

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[12] The log entitles this column "Mentions", with no description of to what that column refers. It includes a list of names.

of the exemption – "content is attorney advice to client." CP 433-438. Any further disclosure by the City could have, or would have, disclosed privileged content.

Requestor Block was wholly aware of the "controversy" involving the Majerle employment termination and subsequent litigation. CP 447-448, 473. The City confirmed this fact in its December 12, 2008 letter in which it informed Block that the City was providing third-party notice to Majerle pursuant to the terms of the litigation settlement agreement. CP 216.

Further, after the City notified Block that its response to her December 2008 PRR would be delayed in order for the City to respond to the serial snow and flood emergencies rather than to her public records request, Block responded by creating another "controversy" the very next day, threatening to sue the Mayor and the City. CP 217, 291.

Unlike Sanders, *supra*, then, in which the substance of the "controversy" supporting the claim of exemption under RCW 42.56.290 was not so readily apparent, the controversy here involving both the Majerle litigation and litigation threatened against the City by Block were obvious and well known, and are further identified and briefly explained on the City's exemption logs by the very nature of the document descriptions themselves.

Nothing more is necessary in order for attorney-requestor Block to make the required "threshold determination of whether the agency properly claimed the privilege." Gronquist, 175 Wn. App. at 744. The propriety of the City's claim is wholly self-evident from the face of the exemption logs.

E. The City Proved with Uncontroverted Evidence That the Withheld Records and the Redacted Records Are Exempt.

In this appeal, Block broadly challenges two separate categories of records – records that were withheld in their entireties (CP 369-379, 428-432) and records that were produced with redactions (CP 380-389, 433-438).

On this summary judgment record, the withheld documents are entirely privileged. Block failed to meet her burden to offer admissible evidence otherwise.

On this record, the redacted documents were found by the trial court after *in camera* review to have been properly redacted. Block likewise failed to offer contrary evidence.

1. In This Case, the Attorney-Client and Attorney Work Product Privileges Are The Bases to Withhold Certain Records in Their Entireties and Without Redaction.

Without pointing to any supporting evidence in the record below, Block speculates that certain City records withheld in their entireties may contain both privileged and non-privileged information. Block Brief at 34.

Block's speculation falls well short of meeting her burden of proof on summary judgment to show that the questioned records contain non-exempt information.

Block chose to bring a motion for summary judgment and not a motion to show cause regarding the entirely withheld records. In a motion to show cause, the burden is on the agency to prove that withholding was proper. RCW 42.56.550(1). Presumably for good reason and with a particular goal in mind, Block likewise chose not to seek *in camera* review of the entirely withheld records. CP 604 (fn 3).

In this case, out of some 1,000 pages produced to Block, Gold Bar withheld only 66 pages as exempt pursuant to RCW 42.56.290 under the attorney-client and work product privileges. The very language of Block's PRR reflects her specific knowledge of the fact that Majerle and the City were engaged in a "controversy," which is specifically described in the PRA as a proper basis to claim an exemption from disclosure. RCW 42.56.290. All of the entirely withheld records specifically relate to the Majerle controversy. CP 428-432.

The City's exemption logs clearly explain the bases for withholding the records under the attorney-client and attorney work product privileges. Block's summary judgment motion offers contrary conjecture, but no contrary proof. Block's argument appears to be

premised on a substantially overbroad reading of the holding in Mechling v. City of Monroe, 152 Wn. App. 830, 222 P.3d 808 (Div. I 2009). Nothing in Mechling requires an agency to turn over any part of an entirely privileged record. In fact, the City's actions are supported by Mechling, as well as Limstrom v. Ladenburg, 136 Wn.2d 595, 963 P.2d 869 (1998), and Soter v. Cowles Pub. Co., 162 Wn.2d 716, 174 P.3d 60 (2007).

In Mechling, the City of Monroe withheld e-mail messages in their entirety solely based on the attorney-client privilege. The attorney work product privilege was not claimed. Mechling, 152 Wn. App. at 850. Without elaborating on the content of the withheld e-mails, the Court explained, "If an exemption applies and the requested records contain both exempt and nonexempt information, the exempt information may be redacted, but the remaining information must be disclosed." Id. at 843. "If the requested records contain information covered by the attorney-client privilege and information that is not covered by the privilege . . . the City may only redact the privileged information." Id. at 853. Conversely, then, if a record contains only privileged information, nothing exists to be redacted. The Court then remanded back to the trial court for *in camera* review to determine whether the e-mails included non-exempt information that should not be redacted. Id.

In Limstrom, the requestor sought the prosecutor's litigation files, which the prosecutor in turn withheld in their entirety under the "attorney work product" doctrine without identifying any of the specific documents contained therein. Limstrom, 136 Wn.2d at 602. Applying CR 26(b)(4), the state Supreme Court read former RCW 42.17.310(1)(j), now codified as RCW 42.56.290, to exempt from disclosure public records which are relevant to a controversy and which are the work product of an agency's attorney. The Court acknowledged the fundamental importance of the work product privilege as recognized by the United States Supreme Court:

> [For a lawyer to perform] his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of

> what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 605-606 (citing to Hickman v. Taylor, 329 U.S. 495, 510-511, 67 S. Ct. 385, 91 L. Ed. 451 (1947)).

In adopting a heightened protection to material falling under "work product," the Limstrom Court outlined the rule to be applied to requests for attorney work product as follows:

> (1) The mental impressions of the attorney and other representatives of a party are absolutely protected, unless their mental impressions are directly at issue.
>
> (2) The notes or memoranda prepared by the attorney from oral communications should be absolutely protected, unless the attorney's mental impressions are directly at issue.
>
> (3) The factual written statements and other tangible items gathered by the attorney and other representatives of a party are subject to disclosure only upon a showing that the party seeking disclosure of the documents actually has substantial need of the materials and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Mental impressions of the attorney and other representatives embedded in factual

statements should be redacted.

Id. at 611-612 (citing to Lewis H. Orland, *Observations on the Work Product Rule,* 29 GONZ. L. REV. 281, 300-301 (1993-94) (citations omitted) (emphases added). Thus, the protection of work product -- that is, the factual information gathered by the attorney and the attorney's legal research, theories, opinions and conclusions[13] -- is "so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." Id. at 606 (emphasis added).

In Limstrom, the Court determined without *in camera* review that fact-gathering documents contained within the prosecutor's files constitute work product. The Court further held that because the requestor had obtained those records from other sources, the requestor had not met his burden to demonstrate the required substantial need and inability to obtain the documents from other sources. Id. at 614-615.[14]

Several years later, the state Supreme Court again applied the Limstrom analysis in stressing the "almost absolute protection" of attorney

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[13] Limstrom, 136 Wn. 2d at 606 (citing to Hickman, *supra*).
[14] The Court remanded to the trial court for *in camera* review of certain other documents that would not ordinarily be work product. Id. at 615.

notes in their entirety under the work product privilege. Soter, 162 Wn.2d at 741. The Court emphasized, "The work product rule protects *documents* and tangible things prepared in anticipation of litigation, and it protects those documents that tend to reveal an attorney's thinking almost absolutely." Id. at 742, citing to CR 26(b)(4) (emphasis in original).[15]

The Court understandably recognized that an attorney's inferences and opinions on what the attorney believes to be important permeate the attorney's notes, concluding, "Where the rule might allow an attorney's notes to be revealed, attorneys will hesitate to keep such notes, leading to inefficiencies in the practice of law." Id.

Here, Gold Bar is entitled to protect its privileged records, and nothing in the Public Records Act requires otherwise:

> The necessity for protection of attorney work product does not diminish because an attorney represents a government agency. Regardless of who the client is, "the attorney's professional task is to provide his client a frank appraisal of strengths and weaknesses, gains and risks, hopes and fears."

Id. (internal citations omitted). Again, there is no dispute that the 66-pages of withheld documents pertain to the Majerle matter and that Block was aware of the City's litigation with Majerle. Of the 66-pages of

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[15] "We conclude . . . [t]hese documents are exempt from public disclosure." Id. at 749.

documents withheld by the City under the attorney client and work product privileges, 23 pages are described as the typed or handwritten notes of the City's insurance defense attorney – Lawrence – regarding "phone calls, case strategy, analysis, research . . ." or "case strategy." Fourteen other pages are described as Lawrence's witness interview notes. Five more pages are described as draft pleadings with Lawrence's handwritten notes and revisions. Twenty-four pages of e-mails between Lawrence, her staff, City personnel and/or the City's insurance provider are described as "case analysis" or "legal discussion" or involving settlement discussions and preparation for an administrative hearing, some with Lawrence's handwritten notes. CP 428-432. These descriptions fall squarely within the heightened, and "almost absolute protection" afforded to entire documents under the attorney work product privilege absent a showing of substantial need and undue hardship by the party seeking disclosure.

Not only did Block fail to meet her burden on this issue as a moving party on summary judgment, Block put forth absolutely no facts or argument justifying a "substantial need" to obtain such highly protected

documents.[16] Limstrom at 612.

2. The City Properly Redacted Certain Other Records Under the Attorney-Client and Work Product Exemptions. Block Provides No Evidence to the Contrary.

In addition to the records withheld in their entireties, Block also challenges certain records redacted by the City (CP 380-389, 433-438). The parties appear to agree that the redacted records do in fact constitute communications between the City's attorneys and City staff members, and that they were created in response to Block's PRRs and threatened lawsuit against the City, or in response to the litigation with Majerle.

The dispute arises due to Block's truly novel proposition that legal advice -- given by the City Attorney to City staff members and specifically regarding the manner in which the City should identify, gather, and produce records in order to comply with Block's PRRs -- is somehow not privileged. Block Brief at 37. Block cites to Neighborhood Alliance, *supra*, for the proposition that the manner in which an agency searched for records must be disclosed. Block Brief at 27-28. Neighborhood Alliance,

[16] Block also argues that the withheld e-mails should be redacted because the e-mails, "would contain non-exempt information in the header showing the date it was sent, to whom, and perhaps portions of the communication." Block Brief at 34. "Perhaps" is insufficient to overcome Block's burden on summary judgment, and courts nonetheless often find e-mail messages entirely exempt under the attorney work-product exemption. (*See* Sanders, *supra*, upholding the State's withholding e-mails in their entirety under the work product privilege.) Despite Block's assertion, the City's exemption logs also contain "sufficient detail of the nature of the classified and other exempt information contained in the document for the Court to conclude that those isolated words or phrases that might not be redacted for release would be meaningless, the material need not be disclosed." Nat'l Sec. Fund, Inc. v. CIA, 402 F.Supp.2d 211, 221 (D.D.C. 2005).

however, does not involve records sent or received by the agency's legal counsel regarding the agency's search, nor does it address the attorney-client privilege at all.

Block asserts without support in the record that the redacted records include communications between the City and its attorneys "related to the search and gathering of records responsive to Block's request, a task typically assigned to a non-lawyer and not typically deemed 'legal' work." Block Brief at 36. Again, Block provides *no* legal or factual support for this proposition.

Despite Block's contention otherwise, the City did not below and does not here take the position that the attorney-client privilege extends to communications unrelated to the purpose of providing legal advice, nor does the City take the position that efforts to identify, gather and produce responsive records are necessarily privileged simply because attorneys are involved.

Rather, the City's position is simple -- when an agency receives a PRR and then seeks advice from its legal counsel regarding the manner in which the agency should identify, gather, or produce responsive records in order to complete such tasks in compliance with the Public Records Act, that legal advice is wholly privileged. And if an agency seeks advice from its legal counsel regarding the manner in which to properly apply

exemptions under the PRA in response to a specific PRR, that legal advice is also wholly privileged.

Under Hangartner v. City of Seattle, the Washington state Supreme Court clarified any misunderstanding that otherwise may have existed, and held that the statutory attorney-client privilege codified at RCW 5.60.060(2)(a) not surprisingly constitutes an "other statute" for purposes of properly exempting privileged documents from production under the PRA. Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004). The privilege applies to communications pertaining to legal advice between the attorney and client. Id. at 452; Sanders, 169 Wn.2d at 853.

The Washington State Attorney General's Model Rules for the PRA provide further guidance in determining whether public records are protected by the attorney-client privilege. WAC 44-14-06002(3) summarizes the attorney-client privilege with respect to public records as:

> [R]ecords reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney in furtherance of the rendition of legal advice.

The Attorney General also opines:

> There may be specific circumstances that need to be considered in reviewing a request for a particular record, and records officers should consult with legal counsel about whether a particular document is exempt from disclosure because of the attorney-client privilege or work product doctrine.

See Public Records: The Attorney-Client Privilege and Work Product Doctrine – Guidance on Recurring Issues (Washington State Attorney General's Office) (Dec. 1, 2004) (emphasis added).

These resources, produced in order to assist public agencies with PRA compliance,[17] expressly direct public officials to seek the advice of legal counsel to determine whether a document is exempt. Reduced to basics, the communication at issue is an agency staff member asking its attorney, "How do we process this PRR in compliance with the Act?" The attorney's response is wholly and fully protected from disclosure under the attorney-client and work product privileges.

The absurdity of Block's argument is best crystallized by reversing the roles. Block would surely, and correctly, object on the basis of privilege if the City had sent discovery requests below asking her to divulge all communications with her counsel regarding the prosecution of this case. The City occupies a no less protected position merely because of its status as a public agency. Port of Seattle v. Rio, 16 Wn. App. 718,

[17] RCW 42.56.155.

724, 559 P.2d 18 (Div. I 1977) ("We recognize that public agencies are entitled to effective legal representation to guarantee the viability of their programs, and that to obtain effective advice the protection of the attorney-client privilege . . . is essential."). *See*, Soter, 162 Wn.2d at 742.

Block's claims mirror the issues present in West, *supra*. In West, the requestor sought records specifically related to how the agency, DNR, responded to his other PRRs. 163 Wn. App. at 241. The records were created after West had filed a lawsuit regarding the other PRRs and were created specifically as a result of the litigation. Thus, DNR withheld the records under the attorney-client and work product privileges. In finding the records were properly withheld in their entirety, the Court stated that "because none of the records withheld would exist but for West's litigation, they are properly exempt under the attorney-client privilege or the attorney work product exemption." Id. at 247.

Likewise, here, Block's February 2009 PRR sought records specifically related to the City's response to her PRRs after Block had repeatedly threatened to sue the City and the very same day she brought a lawsuit for the production of those PRRs. But for Block's requests and threatened litigation, the City would not have created any of these records. Like the records in West, the redacted records here are properly exempt under the attorney-client and work product privileges.

Block also declares, without citation to the record and despite having well over three years to conduct discovery, that she "was unable to obtain significant information about whether Mayor Hill had retrieved or produced her emails in response to Block's PRA request because the City broadly asserted that the redacted contents of the emails was privileged." Block Brief at 36. This assertion is controverted by the actual facts. Initially, the City's legal counsel objected, and properly so, on the record to Block's specific questions the answers to which would have revealed material that had been redacted under the attorney-client and work product privileges. CR 30(h)(2). Additionally, Block chose to pursue a litigation strategy under which she knowingly declined to depose Mayor Hill directly, and she fails to cite to the unambiguous testimony of the then-City Clerk, Laura Kelly, regarding the City's – and Hill's – search for records. *See* CP 71, ll. 6-13; 72, ll. 20-22; 73, ll. 3-9; 79, ll. 11-17; 80, ll. 9-16.

Laura Kelly testified that the records redacted in response to Block's PRR here were redacted upon the express legal advice of the then-City Attorney, Cheryl Beyer:

> Q. Did you obtain legal advice from anyone about how to respond to the public records request?
> KELLY: Yes.

CP 74, ll. 16-18.

> Q. Are there records that were redacted?
> KELLY: Yes.
> Q. And who did the redacting?
> KELLY: Myself, with instructions from our attorney.

CP 75-76, ll. 24-25, 1-2.

> Q. Do you know who crossed out this text at the bottom of the first page?
> KELLY: It would have been me.
> Q. Do you know why you crossed it out?
> KELLY: Through instruction from the attorney.
> ...
> Q. Let's go over to page 2. The same question. Did you receive legal advice about whether or not to redact this text?
> KELLY: Yes.

CP 77-78, ll. 25, 1-4, 12-15.

> Q. Did you decide whether or not to redact this information?
> KELLY: No.
> Q. Did you receive legal advice about whether to redact this information?
> KELLY: Yes.
> Q. Did Crystal Hill tell you to redact this information?
> KELLY: No.
> Q. Who did tell you to redact this information?
> KELLY: I had advice to redact.
> Q. And you chose to follow that advice?
> KELLY: Yes.

CP 81-82, ll. 24-25, 1-11.

> Q. Did you – were you the person who decided to cross out this information?
> KELLY: Yes.
> Q. Did Crystal Hill tell you to cross out this information?
> KELLY: No.
> Q. Did you receive legal advice from anyone before you crossed out this information?
> KELLY: Yes.
> Q. Who was that?
> KELLY: Cheryl Beyer.

CP 83, ll. 3-13.

As the party seeking disclosure of attorney-client and work product documents, Block has the burden to establish a substantial need and inability to obtain the documents from other sources. Limstrom at 612. Kelly's deposition testimony and the City's uncontroverted declarations are fatal to Block's arguments.

As Block correctly pointed out, "[L]egal advice about what PRA exemptions might apply to responsive records is generally privileged." CP 126. Here, the City Clerk specifically sought legal advice about applicable exemptions, and then redacted the records pursuant to the City Attorney's specific instructions. The City's exemption logs reflect that position, and identify the records accordingly – "Content is attorney advice to client" – and clearly identify the controversies present. Block provides no evidence otherwise.

Again, Block moved for summary judgment. The City met its burden by submitting admissible evidence regarding the privileged nature of such communications. Block offered no facts to controvert the City's evidence.

After *in camera* review, the trial court agreed.

F. The City Properly Claimed and Explained Exemptions. No Documents Were "Silently Withheld".

Citing to PAWS II, *supra*, Block claims as error for the first time on appeal that the City's failure to produce certain records below constitutes "silent withholding" because she received those records in response to other, later PRRs. Block Brief at 39. Block failed to raise this argument in the trial court. This Court should refuse to review such arguments. RAP 2.5(a); *see also* Emmerson v. Weilep, 126 Wn. App. 930, 939-940, 110 P.3d 214 (Div. III 2005); Dickson v. U.S. Fidelity & Guaranty Company, 77 Wn.2d 785, 787, 466 P.2d 515 (1970).

Even so, Block's reliance on PAWS II and the PRA's prohibition against "silent withholding" is misplaced. Fundamentally, of course, "[T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate." Neighborhood Alliance, at 719-20. In PAWS II, the requestor made a public records request for a copy of an unfunded grant proposal. PAWS II, 125 Wn.2d at

247. Despite having specific responsive records, the agency simply denied the request without identifying the withheld records on an exemption log. In explaining that the agency's action amounted to silent withholding, the Court stated:

> The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. ...

Id. at 270-271 (internal citations omitted).

Here, and unlike as occurred with the agency in PAWS II, the City's search for responsive records, at the time of the PRRs and using the then-available technology, failed to disclose the subsequently discovered records. Gold Bar did not know at the time that additional responsive records existed and, after completing its search, the City believed it had collected all responsive records.

Block fails to cite to any authority finding an agency liable under the PRA for failing to locate a record after completing a reasonable search at the time of the request. The very premise is flawed – by definition, an agency cannot silently withhold a record when the agency does not know it exists.

G. Block Has Abandoned Assignments of Error Not Adequately Briefed.

Block failed to brief, adequately or at all, certain assignments of error. In relevant part, Block's assignments of error include claims that the trial court erred in "denying Block's Motion for Reconsideration, and failing to make adequate findings explaining the summary judgment decisions." Block Brief at 1. The Block Brief includes no legal argument supporting these two issues, and offers only cursory references in Section I, "Assignments of Error", and in Section II, "Statement of the Case."

"It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." Emmerson, 126 Wn. App. at 939-940 (citing to Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 190, 69 P.3d 895 (Div. I 2003)). Failure to argue or discuss an assignment of error in the opening brief renders that assignment abandoned. Dickson, 77 Wn.2d at 787. Neither may any such arguments or discussion be presented for the first time in a reply brief. Id. at 787-788. Those assignments of error have been abandoned and warrant no further review.[18]

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[18] The City further notes that findings of fact are superfluous on appeal of summary judgment. Block's assignment of error on that issue is accordingly irrelevant. Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

H. Block Has Not Proven Entitlement to Attorneys' Fee.

Block is not entitled to attorneys' fees because she has not prevailed on any issue. RCW 42.56.550(4) entitles a requestor to attorneys' fees and penalties only if he or she is the prevailing party.

In her Brief on this issue, Block further misstates the holding in Limstrom, 136 Wn.2d 595. The Court did not award attorneys' fees on appeal, and instead remanded to the trial court to determine whether attorneys' fees should be included. Id. at 616.

V. CONCLUSION

For the time being, at least, this appeal caps Block's lengthy and misguided crusade against the City of Gold Bar and its elected officials. Over the past many years, Block has lost each and every battle.[19] It is time for Block to lose the war.

This is a summary judgment case. No disputed material facts exist in this record. Block wholly failed to satisfy her burden.

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[19] CP 244.

RESPECTFULLY SUBMITTED this 25 day of August, 2014.

KENYON DISEND, PLLC

By _____

Michael R. Kenyon
WSBA No. 15802
Ann Marie Soto
WSBA No. 42911
Attorneys for Respondent

DECLARATION OF SERVICE

I, Kathy Swoyer, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 25th day of August, 2014, I served a true copy of the foregoing *Brief of Respondent*, on the following counsel of record using the method of service indicated below:

Michele Earl-Hubbard
Allied Law Group, LLC
6351 Seaview Avenue NW
Seattle, WA 98107

- ☐ First Class, U.S. Mail, Postage Prepaid
- ☒ Legal Messenger
- ☐ Overnight Delivery
- ☐ Facsimile
- ☐ E-Mail

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

DATED this 25 August 2014, at Issaquah, Washington.

Kathy Swoyer