IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

STEVEN KOZOL, Petitioner-Appellant; v. WASHINGTON DEPARTMENT OF CORRECTIONS, Respondent-Appellee;	No. 93365-1 MOTION TO STRIKE SECTIONS III AND IV(B) OF RESPONDENT'S ANSWER TO THE PETITION

1. IDENTIFY OF MOVING PARTY:

Petitioner-Appellant Steven Kozol.

2. STATEMENT OF RELIEF SOUGHT:

To strike sections III and IV(B) from Respondent's Answer to Kozol's Petition for Review.

3. FACTS RELEVANT TO MOTION:

Throughout this appellate review the Department has continually cited to evidence that the trial court made an evidentiary ruling to exclude from consideration on any summary judgment issues. Further, the evidence was only filed with the trial court in one of the two cases that are consolidated on appeal. Because the proffered evidence was already excluded by the trial court and the Department did not challenge the issue on appeal, the continuing citation to this inadmissible evidence must be stricken from Respondent's Answer.

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This appeal contains two separate actions that were consolidated in the Court of Appeals. In one of the cases (Walla Walla Superior Court No.12-2-00285-2) COA No. 32643-8-III, the Department submitted an assortment of email communications to argue they established an alleged intent behind Kozol's submission of his records request. CP 885-935. Kozol filed a motion to strike the evidence on the ground that any alleged intent behind record requests was statutorily irrelevant pursuant to RCW 42.56.080 and thus inadmissible under either ER 402 because it was irrelevant under ER 403. CP 550-556, 566-569.

As a result of Kozol's motion to strike, the trial court expressly ruled that it would not consider the email evidence at the summary judgment hearing. "I'm not going to consider it for purposes of the summary judgment motion, cross motions themselves." VRP (June 19, 2014), p. 11.

In the second of the two cases in this appeal (Walla Walla County Superior Court No.13-2-00930-8) COA No.32596-2-III, the Department did not file any email evidence to argue the alleged intent behind the 21 requests which were the subject of the lawsuit. CP 601-873.

Despite the clear evidentiary ruling excluding the evidence for the purposes of the summary judgment motion, the Department has continued its use of the inadmissible emails before the Court of Appeals and this Court. Before the lower court, Kozol moved to strike the use of the inadmissible emails. *See* Appellant's Motion to Strike §§ 11(A), IV(A), IV(B) (2),(3), and IV(C)(1) of the Brief of Respondent. The Commissioner denied the motion to strike and ruled that "the place for Kozol to raise his arguments with respect to the Department's use of these materials is in [his] reply brief to the Department' s [response] brief." Commissioner's Ruling (July 29, 2015). Kozol raised this argument before the appellate court and in response, the Court of Appeals' unpublished opinion only addressed the merits of the summary judgment issues Kozol raised.

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Now, in its answer to Kozol's petition the Department continues to cite to the email evidence to argue that an alleged intent of a requester in seeking public records can be considered by an agency to determine if the requested records are identifiable, and seeks to apply excluded evidence in a case where the evidence was never filed.

4. GROUNDS FOR RELIEF AND ARGUMENT:

a) *The Department's Failure to Raise an Evidentiary Argument In a Cross-Appeal Resulted In Its Waiving the Argument.*

The Department failed to file a cross-appeal to Kozol's appeal and raise the issue which the lower court rejected – namely the use of the evidence for the summary judgment motion. Where no error is assigned to the court's findings relating to the factors it considered in making a determination, they are verities on appeal. *Yousouflan v. Office of Ron Sims*, 168 Wn.2d 444, 450, 229 P. 3d 735 (2010); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P. 3d 611 (2002); *Gormley v. Robertson*, 120 Wn. App. 31, 36, 83 P. 3d 1042 (2004); *see State v. Allen*, 161 Wn. App. 727, 748, 255 P. 3d 787 (2011).

In *Allen*, the prosecutor argued for the exclusion of certain evidence. In his brief, Allen argued that the exclusion of this testimony painted him in a certain light. The court ruled that because "Allen [had] not challenged the evidentiary ruling relating to the exclusion of [the evidence it may not do so via the backdoor." *Allen*, 161 Wn. App. at 748. Neither has the Department challenged the trial court's evidentiary ruling in the case before this Court. Because it has not, the evidence cannot be argued to support the granting of summary judgment to the Department.

b) *The Trial Court Refused to Consider the Department's Proffered Evidence Because It Determined It was Irrelevant and Inadmissible.*

The trial court did not strike the evidence as Kozol requested but determined it was irrelevant

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and inadmissible and did not consider it when making its ruling. VRP, p. 11. Once the trial court has refused to consider proffered evidence, the appellate courts may not consider it if it was not raised as an issue. *See State v. Ryan,* 48 Wn.2d 304, 293 P.2d 399 (1956). In *Ryan,* like here, the trial court considered and struck evidence by an oral ruling. *Id.* at 308. This Court stated that "[w]e must accept the trial judge's statement that he disregarded the challenged testimony entirely." *Id.* Similarly, this Court must accept the trial judge's statement that he disregarded the evidence Kozol challenged.

c) *The Objectionable Evidence Was Only Proffered In One Case And Must Be Struck From, at a Minimum, the Other Case.*

This Petition for Review consists of two cases consolidated for the purposes of appeal. The evidence was not filed in Walla Walla County No. 13-2-00930-8. COA No. 32596-2-III. CP 601-873. It was only filed in filed in Walla Walla County, No. 12-2-00285-2. COA No. 32643-8-III. RAP 9.1(a) limits the record on review to a "report of proceedings and to "clerk's papers." RAP 9.1©. In 12-2-00285-2, the objectionable evidence was filed. Materials not part of the record in a case will not be considered on appeal. *See Housing Auth. of Grant County v. Newbegging,* 105 Wn. App.178, 185-86, 19 P. 3d 108 (2001); *State v. Falling,* 50 Wn. App. 47, 52 fn. 3, 747 P. 2d 1119 (1987); *State v. Armstead,* 13 Wn. App. 59, 65, 533 P. 2d 147 (1975). Because no such evidence was filed in No. 13-2-00930-8, it cannot be considered in this appeal if this Court decides to consider the evidence at all.

d) *This Court Cannot Consider the emails Because the Intent of the Requester in Making His or Her Request Is Irrelevant Except for Penalties.*

Agencies are prohibited from making inquiring into the purpose of the requester except for

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asking whether or not the inspection or copying would violate a specific statutory requirement.[1] RCW 42.56.080. As this Court has stated, "[a]gencies may not inquire into the reason for the request." *Comu-Labat v. Hosp. Dist, No. 2 Grant County*, 177 Wn. 2d 221, 240, 298 P. 3d 741 (2013). This limitation is to prevent agencies from using uncertain claims as pretexts to deny requesters their records. To do otherwise would go directly against the purpose of the Public Records Act.

> The people of this state do not yield their sovereignty to the agencies that serve them. 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 people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. The language is quite clear, agencies do not have the right to decide what records to give based on issues other than statutory exemptions. As the court of appeals held, RCW 42.56.080 "specifically forbids intent, regardless of whether it is malicious in design, from being used to determine if records are subject to disclosure." *DeLong v. Parmelee*, 157 Wn. App.119, 146, 236 P. 3d 936 (2010) (citing RCW 42.56.080). This Court has made it quite clear that no matter what the circumstances, the Department "must respond to all public disclosure requests without regard to the status or motivation of the requester." *Livingston v. Cedeno*, 164 Wn. 2d 46, 53, 186 P. 3d 1055 (2008). Because of this limitation, any evidence regarding a requester's motivation must be struck for the purposes of the Public Records Act.

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[1]Of course, this Court has determined there are two penalty aggravating factors which are taken into account when considering penalties. *Yousoufian v. King County*, 168 Wn.2d 444, 229 P.3d 735 (2010). These are the following: "(1) a delayed response by the agency, especially in circumstances making time of the essence; and "(8) any actual personal economic loss to the requester resulting from the agency's misconduct, where the loss was foreseeable to the agency."

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5. CONCLUSION

For the reasons stated above, Kozol asks this Court to either strike or disregard the evidence previously disregarded by both the trial and appellate courts. He also asks that this Court provide whatever relief it may feel is just and proper including attorney fees and costs..

DATED THIS 12th day of October, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury according to the laws of the United States and the State of Washington, that on the date set forth below, I caused to be served in the manner noted below a copy of the forgoing document on Defendant(s) in this case:

[X] VIA U.S. MAIL [first class] [priority] [express]
[ ] VIA HAND DELIVERY
[ ] VIA FACSIMILE
[X] VIA ELECTRONIC MAIL [by prior agreement]

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