

NO. 47660-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KEVIN ANDERSON,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH
SERVICES,

Respondent.

RESPONDENT'S AMENDED BRIEF

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I. INTRODUCTION

The Department of Social and Health Services, Division of Child Support (DCS), maintains records on more than 350,000 active child support cases. Each case involves a noncustodial parent, a custodial parent, and at least one child. In order to provide support enforcement services, DCS keeps detailed records on both the custodial and noncustodial parent, including home addresses, social security numbers, financial information, criminal history, medical information, family and domestic violence history, and sexual history. Due to the nature of DCS services, the private details of often contentious relationships are inevitably interspersed throughout these records.

Recognizing the wide reach of DCS's services and the sensitive nature of the information obtained when providing those services, the legislature categorically exempted DCS case records from disclosure under the Public Records Act (PRA). Such records, along with any case related information, are "private and confidential" and may only be disclosed under RCW 26.23.120 and related DCS rules. RCW 26.23.120.

Kevin Anderson is a noncustodial parent who requested DCS records related to his support enforcement case. After the Department of Social and Health Services (Department) responded to his request under

RCW 26.23.120, Mr. Anderson sued, claiming the response violated the PRA.

Through his lawsuit and appeal, Mr. Anderson attempts to bypass the law established by the legislature in RCW 26.23.120 and, instead, use the PRA to access confidential DCS records. But when another statute provides the sole procedures and rules governing disclosure of a category of records, the PRA does not provide a cause of action for any alleged deficiencies in the Department's response. *See Wright v. State*, 176 Wn. App. 585, 309 P.3d 662 (2013), *review denied*, 179 Wn.2d 1021 (2014).

There is no issue of fact that the records requested by Mr. Anderson are DCS records governed by RCW 26.23.120, not by the PRA. Therefore, the Department is entitled to judgment as a matter of law that it did not violate the PRA, and this Court should affirm the trial court's grant of summary judgment.

II. COUNTERSTATEMENT OF THE ISSUES

1. Is there any issue of material fact that the case comment history requested by Mr. Anderson is only subject to disclosure under RCW 26.23.120, not under the PRA, where Mr. Anderson does not dispute that the case comment history is "obtained or maintained" by DCS

and “concern[s] individuals who owe a support obligation or for whom support enforcement services are being provided”?

2. Is there any issue of material fact that the e-mail requested by Mr. Anderson is only subject to disclosure under RCW 26.23.120, not under the PRA, where Mr. Anderson does not dispute that the e-mail is “obtained or maintained” by DCS and “concern[s] individuals who owe a support obligation or for whom support enforcement services are being provided”?

3. Did the trial court correctly conclude that RCW 26.23.120 categorically exempts records “obtained or maintained” by DCS “concerning an individual who owes a support enforcement obligation or for whom support enforcement services are being provided” and that the Department is entitled to judgment as a matter of law that it did not violate the PRA when it withheld records governed by RCW 26.23.120?

4. Did the trial court err by refusing to consider Mr. Anderson’s evidence where it considered all the evidence called to its attention on summary judgment, including the Fifth Declaration of Kevin Anderson?

III. STATEMENT OF THE CASE

A. Child Support Case Records

DCS is the state agency charged with establishing and enforcing child support obligations. State and federal law require DCS to provide support enforcement services in a variety of circumstances. *See, e.g.*, 45 C.F.R. 302.33; RCW 26.23.045; WAC 388-14A-2000. When a parent receives public assistance on behalf of a child, both parents are subject to mandatory support enforcement services. RCW 26.23.045; WAC 388-14A-2005. In many other cases, DCS provides support enforcement services based on a parent's request or on a court order. RCW 26.23.045(c), (b).

In order to fulfill its statutory duty to establish and enforce child support obligations, DCS must compile and maintain sensitive information about parents and their children. CP at 227. DCS workers take notes about every case-related communication, event, or action in an electronic record-keeping system. CP at 163. The compilation of notes associated with a given DCS case is known as the "case comment history." CP at 163. Case comments, as well as other records and information concerning DCS cases, include personal information such as names, phone numbers, addresses, birth dates, social security numbers, employer addresses, income, banking, and other financial information. CP at 227. DCS also

keeps a record anytime someone communicates with DCS about his or her case. CP at 227. These communications can include information about personal finances, criminal history, medical information, domestic violence allegations, and, when parentage is at issue, history of sexual activity. CP at 227.

The typical DCS case involves a custodial parent, a non-custodial parent, and at least one minor child. CP at 163, 227. Files from each DCS case, therefore, contain information and records concerning at least two parties or subjects: the custodial parent and the noncustodial parent. CP at 227. The Department maintains DCS records on hundreds of thousands of individuals at any given time. *See* CP at 227 (noting that in 2014 the Department had over 350,000 active child support cases).

By statute, these DCS case records are private and confidential and are subject to public disclosure only pursuant to special rules promulgated by the Department. RCW 26.23.120(1).

B. Mr. Anderson's Request For Records

Kevin Anderson is the noncustodial parent in a DCS case and an inmate under Department of Corrections supervision. *See* CP at 231. On July 5, 2013, the Department received a letter from Mr. Anderson in which he requested:

1. Any records within the last two years where a parent has complained about, or challenged DCS' service of process.
2. Any records concerning Lonnie Clark's 2012 administrative hearing where he challenged DCS' service of process.
3. [Mr. Anderson's] complete case comment history printout.
4. Judy Rupo's¹ complete personnel file.
5. A copy of the e-mail sent from Judy Rupo to King County Prosecutor's office on 3/10/10 regarding [Mr. Anderson's] case (2024929).

CP at 3, 228, 231.

Five business days after receiving the request, the Department responded to Mr. Anderson. CP at 166. The Department explained that DCS records are private and confidential under RCW 26.23.120, estimating that it would take about 45 business days to research, prepare, and provide responsive records. CP at 166.

On July 15, 2013, ten calendar days after receiving the request, the Department provided Mr. Anderson access to 276 pages of responsive records—Judy Roppo's entire personnel file. CP at 245, 248.

¹ Judy Roppo is the DCS Support Enforcement Officer previously assigned to Mr. Anderson's support enforcement case.

In response to Mr. Anderson's request for records related to other people's DCS cases, the Department explained that he could not access those records because they are private and confidential under RCW 26.23.120. CP at 166, 168, 195. Absent a court order or consent from the subject of the records, the Department could not provide them to Mr. Anderson. CP at 166, 168, 195.

Mr. Anderson does not challenge the Department's response to his request for records related to Lonnie Clark, DCS service of process, or Judy Roppo. In response to the Department's summary judgment motion, Mr. Anderson stated that the only records at issue in the case are the "(1) case comment printout" and "(2) an e-mail between DCS employee, Judith Roppo and the King County Prosecutor's Office that pertained to Mr. Anderson's support case." CP at 62. The Department's response is "not being challenged" with regard to any of the other requested records. CP at 62.

In September 2013, the Department further responded, explaining again that DCS records are private and confidential under RCW 26.23.120. CP at 168. Pursuant to that statute and related rules, the Department provided Mr. Anderson with his case comment history records because, as the noncustodial parent, Mr. Anderson is one subject of the case records. CP at 168, 170, 173-91, 236. However, the Department

redacted portions of the case comments to keep the mother's information and communications with DCS confidential. CP at 173-91. The Department provided statutory authority and brief explanations for the redactions, and in the left margin of the case comments, the Department noted an explanation for each redaction. For example, where the Department redacted the custodial parent's address, it noted the number "2" in the left hand margin. CP at 17. On an accompanying page, next to the number "2" it explained that "[a]ddress and contact information of the parties, children and other individuals may not be disclosable under RCW 26.23.120, RCW 74.04.060, RCW 74.04.062, WAC 388-14A-2107 and WAC 388-14A-2135." CP at 34. It further explained that "contact information includes e-mail addresses, telephone numbers, fax numbers, employer and daycare information." CP at 34. Because the records are governed by RCW 26.23.120, that statute was referenced in connection with every redaction. CP at 34; *see also* CP at 15-33 (referencing only numbers "1" through "4" on the list of explanations).

The Department also responded to Mr. Anderson's request for "the e-mail sent from Judy Rupo to King County Prosecutor's office on 3/10/10 regarding [his] case." CP at 168, 171. When the Department searched for the requested e-mail, the only copy it found was imbedded within an e-mail chain sent by the King County Prosecutor and received

by Ms. Roppo. CP at 164. The Department determined that all of the e-mails contained in the chain were privileged attorney-client communications in which Ms. Roppo sought, and the prosecutor provided, legal advice regarding Mr. Anderson's DCS case. CP at 164. Accordingly, the Department withheld the record and provided an exemption log and brief explanation. CP at 164, 169-70. The exemption log identified the e mail's author as the prosecutor for the state and the recipient as Judy Roppo. CP at 169. The brief explanation stated that "[i]nformation related to communications between the Division of Child Support (DCS) and the Attorney General (AG), prosecutor or other attorney representing them may not be disclosable under RCW 5.60.060." CP at 169-70.

Mr. Anderson appealed the Department's response to his request for DCS records in a letter dated October 2, 2013.² CP at 233. Mr. Anderson asked the Department to clarify which subsection of RCW 5.60.060 applied to the March 10, 2010, e-mail. CP at 233. He also stated that he believed the Department inverted the "to" and "from" categories when creating the exemption log. CP at 233. Within a few days, the Department responded that subsection (2)(a) of RCW 5.60.060

² Mr. Anderson sent a second letter appealing the Department's response to his request for Judy Roppo's personnel file. CP at 221. The Department has no record of receiving any administrative appeal concerning the case comments. CP at 228.

codifies the attorney-client privilege referenced in the Department's initial response and affirmed the withholding. CP at 195.

C. Mr. Anderson's PRA Complaint

In June 2014, Mr. Anderson filed a complaint in superior court alleging that the Department's response to his July 5, 2013 records request did not comply with the PRA. CP at 1. The complaint includes factual allegations regarding his request for the March 10, 2010 e-mail between DCS and a King County Prosecutor. CP at 2-6. It makes no specific mention of the case comments, nor does it claim that the Department's redactions to the case comments were improper. *See* CP at 1-10.

Mr. Anderson first expressed concern about case comment redactions during discovery. CP at 228. Upon receiving Mr. Anderson's discovery requests that expressed concerns about redactions to the case comments, the Department promptly reviewed the redactions and provided a revised case comment history under RCW 26.23.120. CP at 236-37; *see also* CP at 103-111 (Plaintiff's First Set of Requests for Admission and Defendant's Responses Thereto). In a cover letter, the Department explained again that DCS case records are only subject to disclosure under RCW 26.23.120. CP at 236. It further explained that under that statute, Mr. Anderson can access DCS records or information where he is the subject but not where he was not the subject of, or did not provide the

information. CP at 236. The Department even described how this rule applies to Mr. Anderson's case comment history: he cannot access, and the Department must redact, records and information related to the custodial parent, including records about her conversations with DCS workers. CP at 236.

On February 2, 2015 Mr. Anderson filed a pleading entitled "Plaintiff's Motion to Show Cause," which asked the court to summarily conclude that the Department's response to his request for case comments violated the PRA. Br. of Appellant at 3. The Department responded with a cross-motion for partial summary judgment on the same issue, explaining that under RCW 26.23.120(1) records and information held by DCS concerning individual support enforcement cases, including case comments, are only subject to disclosure and production under that statute, not the PRA. CP at 35-36. The trial court denied both motions, remarking that Department could move for summary judgment at a later date. RP at 13-14; CP at 48, 157.³

The Department attempted to address Mr. Anderson's remaining concerns outside of court. CP at 240-41. In a March 6, 2015, letter, the Department again explained that DCS case records are private and

³ Mr. Anderson later moved to vacate the trial court's order denying both motions, but he did not appear at the hearing on his motion to vacate, and the court did not rule on the motion. CP at 560.

confidential and only subject to disclosure under RCW 26.23.120. With regard to the requested e-mail, the Department explained that it related to “individuals who owe a support obligation or for whom support enforcement services were provided”—in other words, the noncustodial parent (Mr. Anderson) and custodial parent (the mother of Mr. Anderson’s child) in a DCS case. As a record governed by RCW 26.23.120, the e-mail could be disclosed to the subject of the record. However, the Department further explained that this particular e-mail was a privileged, attorney-client communication, which Mr. Anderson cannot access, pursuant to RCW 26.23.120(3)(b). Nonetheless, “in response to [Mr. Anderson’s] expressed concern about the identity of the author and recipient of the requested e-mail,” the Department provided a redacted copy of the e-mail chain, which showed the author and recipient of each e-mail. CP at 242-43.

On April 8, 2014, the Department filed a Motion for Summary Judgment on all of Mr. Anderson’s PRA claims. CP at 535. Mr. Anderson did not timely respond under CR 56. Instead, the trial court received Mr. Anderson’s response and supporting declaration four days before the scheduled hearing, on May 4, 2015. The trial court filed the

response and supporting declaration as one document in the docket. *See* CP at 57, 585-659.

The day before the hearing, Mr. Anderson submitted a letter to the trial court requesting “a ruling without oral argument.” CP at 572, 581. Accordingly, the court did not consider oral argument, but ruled in favor of the Department based solely on written materials. CP at 57. The Court’s Order on Summary Judgment lists the documents it considered, including “Plaintiff’s Response to Defendant’s Motion for Summary Judgment filed directly with court 5/4/15.” CP at 57. That filing included Mr. Anderson’s Fifth Declaration and attachments. CP at 585-659.

On June 3, 2015, Mr. Anderson filed a notice of appeal contesting the trial court’s summary judgment order. CP at 138.

IV. ARGUMENT

A. Standard Of Review For PRA Claims Decided On Summary Judgment

An appellate court reviews a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Neighborhood Alliance of Spokane Cty. v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119

(2011). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Sanders v. State*, 169 Wn.2d 827, 844, 240 P.3d 120 (2010). In reviewing a motion for summary judgment, the court construes facts in the light most favorable to the nonmoving party. *Id.* at 844-45. This Court need not approve the reasoning of the trial court; it may affirm an order on summary judgment on any grounds supported by the record below. *Kinney v. Cook*, 150 Wn. App. 187, 192, 208 P.3d 1 (2009).

Questions of law, including an agency's obligations under the PRA, are reviewed de novo. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010).

B. Summary Judgment Is Appropriate Because There Is No Genuine Issue of Material Fact That The Requested Records Are Exempt From Production Under The PRA By RCW 26.23.120

In his appeal of the trial court's summary judgment order, Mr. Anderson does not demonstrate that there is any dispute of material fact. Instead, he claims that the trial court erred in concluding, as a matter of law, that the DCS records at issue were exempt from PRA disclosure under RCW 26.23.120, 42.56.070, and 5.60.060. Mr. Anderson claims that the Department violated the PRA by (1) redacting DCS case

comments, (2) providing inadequate explanation for those redactions, and (3) withholding an e-mail between DCS and its attorney.

Mr. Anderson is incorrect. It is undisputed that all of the records at issue on appeal concern individuals who are subject to or are receiving DCS support enforcement services. Accordingly, RCW 26.23.120—not the PRA—governs the disclosure and production of the records. Where, as here, an “other statute” provides exclusive rules for disclosure of particular records, such records are wholly exempt from the PRA, and any alleged failure to produce them cannot serve as the basis for a PRA claim. *See Wright v. State*, 176 Wn. App. 585, 599, 309 P.3d 662 (2013), *review denied*, 179 Wn.2d 1021 (2014). As such, Mr. Anderson does not have a cause of action under the PRA, and this Court should affirm the trial court’s grant of summary judgment.

1. RCW 26.23.120 Is An “Other Statute” That Exempts Certain DCS Records From The PRA

The PRA generally requires agencies to make public records available for inspection by the public. RCW 42.56.070. The Act defines a public record broadly as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or

local agency regardless of physical form or characteristics.”
RCW 42.56.010(3).

Not all public records, however, are available to the public under the PRA. The requirement to make records available for public inspection does not apply to records that fall “within the specific exemptions of [the PRA] *or other statute which exempts or prohibits disclosure of specific information or records.*” RCW 42.56.070(1) (emphasis added). Where an “other statute” prohibits disclosure of specific public records in their entirety, then the record or information may be withheld in its entirety, notwithstanding the PRA’s redaction requirement. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994). Where an “other statute” applies, the PRA “is simply an improper means to acquire” the information it protects. *See id.* at 262 (discussing Trade Secrets Act).

The plain language, policy, and legislative history of RCW 26.23.120 demonstrate that it is an “other statute” that categorically exempts specific DCS records from disclosure under the PRA.

a. RCW 26.23.120 Unambiguously Exempts Confidential DCS Records From Disclosure Under the PRA

If the language of a statute is clear on its face, courts must give effect to its plain meaning and should assume the Legislature means what

it says. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). The plain meaning of a statute is discerned by looking at “all that is said in the statute and related statutes which disclose legislative intent about the provision in question.” *State v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

RCW 26.23.120(1) provides:

Any information or records concerning individuals who owe a support obligation or for whom support enforcement services are being provided which are obtained or maintained by . . . the division of child support . . . shall be private and confidential and shall only be subject to public disclosure as provided in subsection (2) of this section.

RCW 26.23.120(1). RCW 26.23.120(2), in turn, grants the Department broad discretion to adopt rules governing the disclosure of DCS records.

The plain language of this statute categorically exempts all DCS records and information related to individuals who are subject to DCS child support enforcement services from the PRA. RCW 26.23.120 does not provide additional rules governing the disclosure of these DCS records; it provides the “only” permissible rules for disclosure. RCW 26.23.120(1). The PRA’s rules for disclosure and production of the records, therefore, cannot apply to DCS records governed by RCW 26.23.120.

Although Washington courts have not specifically addressed whether RCW 26.23.120 is an “other statute” within the meaning of RCW 42.56.070, this Court has held that nearly identical language in chapter 13.50 RCW constitutes an “other statute” exemption. RCW 13.50.100(2) provides that specified records held by a juvenile justice or care agency “shall be released *only* pursuant to this section and RCW 13.50.010.” (Emphasis added). *Cf.* RCW 26.23.120(1) (specified DCS records “shall *only* be subject to public disclosure as provided in subsection (2) of this section.”) (emphasis added). Based on this language, this Court has repeatedly held that chapter 13.50 RCW is an “other statute” exemption from the PRA which “provides the exclusive means of obtaining” records to which it applies. *Wright v. State*, 176 Wn. App. 585, 596, 309 P.3d 662 (2013) (citing *Deer v. Dep’t of Soc. & Health Servs.*, 122 Wn. App. 84, 88, 93 P.3d 195 (2004)); *In re Dependency of K.B.*, 150 Wn. App. 912, 920, 210 P.3d 330 (2009). Like RCW 13.50.100(2), the plain language of RCW 26.23.120 declares it to be the *sole* statute governing disclosure of specified DCS records, and therefore the PRA does not apply.

Mr. Anderson contends that RCW 26.23.120 does not exempt DCS records from the PRA because subsections (2) and (3) allow disclosure to select people under specified circumstances. Br. of Appellant at 22. But

this argument ignores the plain language of RCW 26.23.120, as well as this Court's precedents under RCW 13.50.100. Records governed by RCW 26.23.120 are never subject to disclosure under the PRA. Rather, under RCW 26.23.120(2), the Department may only disclose DCS records to particular individuals who meet statutory and regulatory requirements. This is not equivalent to the PRA's broad decree in favor of public disclosure; this is a narrowly tailored statute that protects parent privacy by separately regulating the disclosure of sensitive, confidential records and information. As this Court has repeatedly held in the context of juvenile justice records, where an "other statute" provides the exclusive means of obtaining records, the PRA is an improper means for obtaining those records. *Wright*, 176 Wn. App. 585; *Deer*, 122 Wn. App. 84; *K.B.*, 150 Wn. App. 912.

Mr. Anderson also asserts that "RCW 26.23.120(7) incorporates DCS records into the PRA." Br. of Appellant at 23, 14. RCW 26.23.120(7) provides:

Nothing in this section shall be construed as limiting or restricting the effect of RCW 42.56.070(9). Nothing in this section shall be construed to prevent the disclosure of information and records if all details identifying an individual are deleted or the individual consents to disclosure.

RCW 26.23.120(7). Mr. Anderson's interpretation of subsection (7) would render the clear language of subsection (1) meaningless.

Provisos within a statute operate as limitations upon or exceptions to the general terms of the statute to which they are appended and as such should be strictly construed with any doubt to be resolved in favor of general provisions, rather than exceptions. *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974).

The general rule of RCW 26.23.120(1) is unambiguous: DCS records related to individual support enforcement cases "shall be private and confidential and shall only be subject to public disclosure as provided in [RCW 26.23.120]." If, as Mr. Anderson argues, subsection (7) "incorporates" DCS records into the PRA, anyone could access a specific, known individual's confidential DCS records. For example, a noncustodial parent convicted of molesting his child could ask for a de-identified copy of the custodial parent's records and the Department would have to turn those records over, including the custodial parent's address, her communications with the Department, and any other non-identifying information in the records. In fact, anyone could access those records, for any purpose. Under the PRA, which Mr. Anderson says applies to these DCS records, the identity of the requestor, the purpose of the request, and the fact that he already knows the identity of the custodial

parent would not matter. The Department would be required to produce the records with the custodial parent's name and other identifiers redacted. *See Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 416-418, 259 P.3d 190 (2011).

This cannot be the result intended by the legislature. To the contrary, the identity of the person seeking information and the purpose for which information is sought is central to RCW 26.23.120 and related rules. *See, e.g.*, RCW 26.23.120(3)(b) (allowing disclosure *to the subject* of the records under certain circumstances); (d) (allowing disclosure *to the parties* to an action for purposes relating to the child support order); WAC 388-14A-2105(2) ("DCS discloses information and records only to a person or entity listed in this section or in RCW 26.23.120, and only for a specific purpose allowed by state or federal law."). Mr. Anderson's interpretation renders RCW 26.23.120's confidentiality rule meaningless and should be rejected by this Court.

On the other hand, when subsection (7) is read in context, it is clear that it is merely one rule within RCW 26.23.120's system of disclosure. It does not obliterate the general rule that RCW 26.23.120, not the PRA, governs disclosure of DCS records. Rather, like every other subsection of RCW 26.23.120, subsection (7) serves a discrete purpose. Mr. Anderson offers no reason that the first and second sentences of

subsection (7) should be divorced to have two separate, unrelated meanings. The first sentence of subsection (7) prohibits public offices and officials from disclosing lists of individuals for commercial purposes. Read in context with the first sentence, the second sentence of subsection (7) allows for disclosure of aggregated DCS information when the records can be de-identified or an individual whose information is disclosed consents to disclosure.

Subsection (7) has no application here. Mr. Anderson's request for his case comments and the specified e-mail was not a request for aggregated information. Nor was it possible for the Department to de-identify the records for release to Mr. Anderson. Mr. Anderson is well aware of the identity of the mother of his child, and removing her name would not protect the confidentiality of her home address, her contact information, or her communications with the Department.

Finally, Mr. Anderson argues that DCS's "most wanted" website demonstrates that DCS records are not confidential under RCW 26.23.120. Br. of Appellant, 23. Mr. Anderson did not submit any evidence regarding this website to the trial court, and the record contains no reference to it. Under the circumstances, this Court should disregard Mr. Anderson's discussion of the website. *See* RAP 9.12 (limiting appellate review of an order granting summary judgment to evidence and issues called to the

attention of the trial court). Regardless, Mr. Anderson's argument lacks merit. RCW 26.23.120(2) grants the Department broad authority to adopt rules that specify what information is confidential, what can be disclosed, and to whom. Accordingly, the Department adopted rules governing a child support "most wanted" website. WAC 388-14A-4600, -4605. These rules are within the Department's regulatory authority and do not affect the general rule of confidentiality in RCW 26.23.120.

In sum, this Court need not construe the meaning of RCW 26.23.120(1). The statute's language is clear. DCS records related to individual DCS cases may only be disclosed pursuant to RCW 26.23.120, and the PRA's disclosure rules do not apply to such records.

b. Exempting DCS Records From Disclosure Under The PRA Is Consistent With Legislative Objectives Of The PRA And RCW 26.23.120

Reading RCW 26.23.120 as an "other statute" that exempts DCS records from the PRA also comports with the objective of PRA exemptions generally, which "is to exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens." *Deer*, 122 Wn. App. at 90.

RCW 26.23.120 exempts a particularly sensitive class of information and records from disclosure under the PRA. It applies not to

all records held by DCS, but specifically to records and information “concerning individuals who owe a support obligation or for whom support enforcement services are being provided.” RCW 26.23.120(1). In other words, the statute protects DCS records that contain private, personal information related to individual parties to child support enforcement cases. *See, e.g.*, CP at 227. Further evidence that these records contain particularly sensitive information is found in federal law, which conditions receipt of federal funds for child support enforcement activities on states implementing “safeguards, applicable to all confidential information handled by the state agency, that are designed to protect the privacy rights of the parties [to support enforcement cases].” 42 U.S.C. §§ 654(26), 655(a)(1)(A); *see also* 45 C.F.R. § 303.21 (generally prohibiting disclosure of information relating to specific individuals for purposes other than administration of a child support enforcement program).

The legislative history of RCW 26.23.120 also suggests that the legislature intended to protect the confidentiality of DCS records through an “other statute” exemption to the PRA. The legislature enacted RCW 26.23.120 in 1987, the same year the legislature added the “other statute” exemption to the PRA. Laws of 1987, ch. 435, § 12; Laws of 1987, ch. 403 § 3. The legislature would have been acutely aware of the interaction between this type of “other statute” and the PRA, because it

had recently amended the existing language of RCW 42.56.070(1) (formerly codified at RCW 42.17.260) to require agencies to make public records available “unless the record falls within [specific exemptions], *or other statute which exempts or prohibits disclosure of specific information or records.*” *Id.* (emphasis added). RCW 26.23.120 is one such “other statute which . . . prohibits disclosure of specific information [and] records.”

2. There Is No Factual Dispute: The Requested Case Comments And E-mail Fall Within The Category Of DCS Records That RCW 26.23.120 Exempts From The PRA

Mr. Anderson claims that the Department’s response to his request for case comments and a specific e-mail relating to his DCS case violated the PRA. The only material fact to the PRA claim is whether the e-mail and case comments fall within the category of records exempt from the PRA by RCW 26.23.120. In order for records or information to be exempt from the PRA by RCW 26.23.120, they must (1) be “obtained or maintained by” DCS and (2) relate to “individuals who owe a support obligation or for whom support enforcement services are being provided.”

Mr. Anderson has never disputed that the case comments and e-mail are maintained by DCS and concern individuals who owe a support obligation or for whom support enforcement services are being provided.

First, a “case comment history” is a compilation of notes taken by DCS workers related to a specific DCS case. CP at 163, 229. Such records necessarily concern individuals who owe a support obligation or for whom support enforcement services are being provided.

Second, Mr. Anderson requested an “e-mail sent from Judy Rupo [a support enforcement officer] to King County Prosecutor’s office . . . regarding [Mr. Anderson’s] case.” CP at 231 (emphasis added). By its terms, this request seeks a record “regarding” an individual’s support enforcement case, which necessarily falls within the category of records governed by RCW 26.23.120.

3. The PRA Does Not Provide A Remedy Where The Records Requested Are Governed Exclusively By Separate Rules Established In RCW 26.23.120

Mr. Anderson claims that DSHS wrongfully withheld public records and otherwise failed to comply with the PRA. However, because disclosure of the DCS records requested by Mr. Anderson is governed exclusively by RCW 26.23.120, any alleged failure to provide such records cannot constitute a violation of the PRA.

As discussed above, this Court has held that nearly identical language in RCW 13.50.100 creates a separate, exclusive means for obtaining the records it governs. *Wright*, 176 Wn. App. at 599. When a record is available to a requester “only under chapter 13.50 RCW, DSHS’s

failure to produce it in response to [a] PRA request cannot serve as the basis for a PRA violation.” *Wright*, 176 Wn. App. at 599; *see also Deer v. Dep’t of Soc. & Health Servs.*, 122 Wn. App. 84, 88, 93 P.3d 195 (2004). Under *Deer* and *Wright*, a trial court errs when it finds a violation or awards penalties under the PRA related to the production of records governed by chapter 13.50 RCW. *Id.*

In *Deer*, for example, the Department did not respond to Deer’s requests and did not “provide accurate information as to the correct procedure to obtain records.” 122 Wn. App. at 88. Nonetheless, this Court refused to award sanctions under the Public Disclosure Act (now codified as chapter 42.56 RCW, the PRA) because “the PDA does not provide an applicable remedy.” *Id.*

Just as 13.50 RCW establishes a separate procedure to obtain juvenile justice records, RCW 26.23.120 establishes a separate, exclusive means of obtaining the DCS records it governs. *See Wright*, 176 Wn. App. at 597 (applying almost identical language in RCW 13.50.100). Under the regime established in RCW 26.23.120, an individual may obtain records from his or her own DCS case. RCW 26.23.120(3)(b). But an individual may not obtain records or information related to the other party, unless some other rule in RCW 26.23.120 or related regulation applies. Additionally,

RCW 26.23.120(3)(b) incorporates other PRA exemptions by reference; the subject of DCS records cannot access records that would otherwise be exempt from disclosure. Importantly, the provision only incorporates PRA exemptions; it *does not* incorporate all PRA rules and standards, because RCW 26.23.120 entirely supplants the PRA's disclosure requirements. This limited incorporation of PRA exemptions provides further evidence that the Legislature intended records falling under RCW 26.23.120 to be governed by its provisions, borrowing from the PRA only where explicitly stated within RCW 26.23.120.

Thus, even if the Department fails to provide records to an individual who is allowed access under RCW 26.23.120, the Department does not violate the PRA and is not subject to PRA sanctions. It is not the PRA, but rules adopted under RCW 26.23.120(2), that provide “what information is confidential,” “the individuals or agencies to whom [DCS records or information] may be disclosed,” “procedures to obtain the information or records,” and “safeguards necessary to comply with federal law.” *See* RCW 26.23.120(1)-(2). RCW 26.23.120 does not simply allow DSHS to redact DCS records as part of the response to a request under the PRA; RCW 26.23.120 wholly removes these records from operation of the PRA and provides a substitute statutory and regulatory framework to govern public access to the records.

Because the PRA does not require the Department to produce the DCS records at issue here, any failure to disclose or produce such records cannot support a cause of action under the PRA. Under the circumstances, Mr. Anderson's PRA claims related to DCS records must be dismissed.

a. The Department's Explanations For Redactions To The Case Comments Did Not Violate The PRA

Mr. Anderson argues that the Department's explanations for redactions made to the case comments are inadequate under PRA standards. Br. of Appellant at 7, 10-15. As previously established, the case comments requested by Mr. Anderson are wholly exempt from disclosure or production under the PRA and governed instead by RCW 26.23.120. Thus, the Department's response cannot serve as the basis for a PRA violation.

But even if the PRA did apply here, Mr. Anderson's claims would fail. Mr. Anderson claims that the Department's explanations are unclear because the Department cites to multiple authorities for each redaction. Mr. Anderson relies on *City of Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014), to support his claim, suggesting that an agency violates the PRA any time it cites multiple statutory exemptions. Br. of Appellant at 11. Mr. Anderson mischaracterizes *City of Lakewood*. In that case, the Court held that where records are governed by the PRA, any

redactions must be accompanied by a brief explanation that allows the requestor to determine whether the exemption is properly invoked. *Id.* at 97. The city’s explanations were not adequate because it cited to statutory exemptions without explaining how the exemption applied to the records produced, and it was not obvious on the face of the statute how the exemption applied. *Id.* at 95. Here, the Department did not merely cite a statutory exemption without explanation. It cited multiple statutes and regulations that all exempt the same information and explained the general nature of the redacted information. For example, where the Department redacted the custodial parent’s address, it marked the redaction with the number “2.” CP at 116. On the corresponding list of common redactions, under “2” the Department explained, “contact information and personal identifiers for the custodial parent are exempt from production and have been redacted . . . includ[ing] home address.” CP at 114. Next to this explanation, the Department cited RCW 26.23.120, RCW 74.04.060, RCW 42.56.230, and WAC 388-14A-2105, all of which protect the confidentiality of the custodial parent’s address. CP at 114.

DCS case comments are governed by RCW 26.23.120, not by the PRA, so the PRA’s brief explanation requirement is inapplicable. Even so, the Department’s explanations met the standard established in *City of*

Lakewood, and this Court should hold that the Department did not violate the PRA.

b. The Department Did Not Violate The PRA By Redacting Information From The Case Comments It Provided To Mr. Anderson

Mr. Anderson also argues that redactions to the case comments violate the PRA. But the case comments may only be disclosed pursuant to RCW 26.23.120 and related rules, so any redactions to the case comments cannot violate the PRA.

Mr. Anderson is not entitled to any of the case comments under the PRA. Under RCW 26.23.120(3)(b), however, he can access case comments where he is the subject. Thus, in response to Mr. Anderson's request, the Department provided the case comments according to the rules established by RCW 26.23.120. He is not entitled to the case comments where the custodial parent is the subject or that document the custodial parent's communications with the Department, and the Department redacted those case comments.

Mr. Anderson did not object to the redactions to the case comments at any time before commencing this lawsuit. CP at 233, 228. Once Mr. Anderson raised concerns about specific redactions, the Department reviewed the redactions and provided an updated copy of the case comments. CP at 229, 236-37. It left unredacted information that it

could reasonably justify disclosing to Mr. Anderson under RCW 26.23.120. CP at 229, 236-37.

Even if Mr. Anderson could argue that he is the “subject” of all of the case comments, RCW 26.23.120 would nonetheless forbid disclosure of information related to the custodial parent in this case. RCW 26.23.120(3)(b) provides that DCS records may be disclosed to “the person the subject of the records or information, *unless the information is exempt from disclosure under chapter 42.56 RCW.*” (Emphasis added.) RCW 26.23.120 thus incorporates all other PRA exemptions into its system of disclosure rules.

RCW 74.04.060 is one such exemption. RCW 74.04.060 provides, “For the protection of applicants and recipients, the department . . . [is] prohibited, except as hereinafter provided, from disclosing the contents of any records, files, papers and communications, except for purposes directly connected with the administration of the programs of this title.” RCW 74.04.060(1)(a). DCS’s support enforcement program is established under Title 74. *See* RCW 74.20-74.20A. “Applicant” is defined by statute as “any person who has made a request, or on behalf of whom a request has been made, to a county or local office for assistance.” RCW 74.04.005(2). A “recipient” is “any person receiving assistance.” RCW 74.04.005(12). “Assistance”, in turn, is “public aid to persons in

need thereof for any cause, including services.” RCW 74.04.005(11). Under RCW 74.04.060, the Department is prohibited from disclosing the contents of any records related to applicants for, or recipients of, DCS support enforcement services, including records related to the noncustodial parent involved in Mr. Anderson’s support enforcement case. Thus, RCW 74.04.060 works in concert with RCW 26.23.120 to protect confidential child support records and information.

The Department’s willingness to work with Mr. Anderson to provide records where permissible under RCW 26.23.120 does not change that the case comments are entirely exempt from disclosure under the PRA, and the Department’s response to a request for the case comments cannot serve as the basis for a PRA claim.

c. The Department Did Not Violate The PRA By Withholding An E-mail Between DCS And Counsel Related To Mr. Anderson’s DCS Case

Like the case comment history, the March 2010 e-mail “regarding [Mr. Anderson’s] DCS case” is a record “obtained or maintained by DCS” “concerning an individual who owes a support enforcement obligation or for who support enforcement services are being provided.” RCW 26.23.120. As such, the e-mail is “private and confidential and shall only be subject to public disclosure as provided in [RCW 26.23.120],” and

the Department's withholding of the e-mail cannot be a PRA violation. RCW 26.23.120(1).

Nor does RCW 26.23.120 provide Mr. Anderson access to the e-mail. Even if Mr. Anderson, rather than the custodial parent, is the sole subject of the e-mail, RCW 26.23.120(3)(b) nonetheless bars the Department from providing it to him. As discussed, that statute incorporates all other PRA exemptions into RCW 26.23.120's rules. Pursuant to RCW 26.23.120(3)(b), a person who is the subject of the records or information may obtain those records, unless they would otherwise be exempt from disclosure under chapter 42.56 RCW, including records that are protected by attorney-client privilege. Although the attorney-client privilege is incorporated into the rules for disclosure through RCW 26.23.120(3)(b), it is nonetheless RCW 26.23.120, not the PRA, which governs disclosure of the record. PRA disclosure rules, including those related to redactions and exemption logs, simply do not apply.

The e-mail, sent from a DCS worker to a King County prosecutor, seeks legal advice about a DCS case. By statute, county prosecutors provide legal counsel to the Department in child support cases. *See* RCW 74.20.220. As such, the e-mail is an attorney-client privileged communication, and not subject to disclosure under RCW 26.23.120.

As with case comments, the Department's attempts to clarify the reasons for its withholding do not alter the fundamental nature of the e-mail. It is a record maintained by DCS concerning an individual's support enforcement case, and is not subject to disclosure or production under the PRA.

C. The Trial Court Properly Denied Mr. Anderson's Motion To Show Cause

Mr. Anderson's pleading entitled "Motion to Show Cause" did not ask the trial court to set a show cause hearing, the central hearing on the merits under the PRA's judicial review rules (*see* RCW 42.56.550). A hearing on the merits of his PRA claims was already set for September 2015. Instead, the motion asked the trial court to summarily conclude that the Department violated the PRA when it responded to Mr. Anderson's request for the case comments from his DCS case. However, Mr. Anderson did not identify the motion as a motion for summary judgment, and he did not comply with CR 56, which requires a motion to be filed 28 calendar days before the date of hearing. Because Mr. Anderson sought judgment on the merits of his PRA claim without proper notice under CR 56, the trial court properly denied the motion.

Nonetheless, Mr. Anderson's Motion to Show Cause fails for the same reasons that the trial Court's grant of summary judgment to the

Department is appropriate: the records at issue are wholly exempt from the PRA by RCW 26.23.120. Thus, Mr. Anderson's first and second assignments of error seek review of the same issues, and this Court should affirm the trial court's denial of the Motion to Show Cause.

D. The Trial Court Considered All Evidence Submitted By Mr. Anderson In Opposition To The Department's Motion For Summary Judgment

In his third assignment of error and related issue, Mr. Anderson argues that the trial court "abuse[d] its discretion by refusing to consider [his] not-objected-to evidence submitted in opposition to [the Department's] motion for summary judgment." Br. of Appellant at 8. Mr. Anderson does not address this assignment of error in the argument section of his opening brief and cites no legal authority supporting his contention. He merely states that "the [trial court] apparently failed to consider Anderson's uncontested declaration and evidence submitted in opposition to summary judgment." Br. of Appellant at 6. "This court will not consider arguments for which a party has not cited legal authority." *Johnson Forestry Contracting, Inc. v. Dept. of Natural Res.*, 131 Wn. App. 13, 25, 126 P.3d 45 (2005). Under the circumstances, this Court need not address Mr. Anderson's third assignment of error.

In addition to lack of legal authority, Mr. Anderson's assignment of error is factually inaccurate. An appellate court reviews evidentiary

rulings made in conjunction with a summary judgment motion de novo, not under the abuse of discretion standard. *Cotton v. Kronenberg*, 111 Wn. App. 258, 264, 44 P.3d 878 (2002) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). In the trial court's Order on Summary Judgment, it listed the documents it considered when ruling on the Motion for Summary Judgment. CP at 57. The list includes, "Plaintiff's Response to Defendant's Motion for Summary Judgment filed directly with court 5/4/15." CP at 57. Mr. Anderson did not include this document in his designation of clerk's papers. Instead, he designated the "Response to Defendant's Motion" filed on May 12, 2015, *after* the trial court issued its Order on Summary Judgment. CP at 145, 57-59. A review of the documents listed by the court on its order for summary judgment reveals that the Response filed directly with the court on May 4, 2015 included Mr. Anderson's Fifth Declaration and attachments. *See* CP at 585-659. Thus, the trial court did not refuse to consider Mr. Anderson's evidence and did not abuse its discretion in that regard.

E. Mr. Anderson Is Not Entitled To Attorney's Fees Or Costs

Because disclosure of the records requested by Mr. Anderson is not governed by the PRA, the Department cannot have violated the PRA when it responded to Mr. Anderson's request and Mr. Anderson cannot be

the prevailing party. Additionally, Mr. Anderson is not represented by counsel in this portion of the proceedings or in the proceedings below and therefore would not be entitled to attorney's fees if he prevailed. *Mitchell v. Dep't of Corrections*, 164 Wn. App. 597, 608, 277 P.3d 670 (2011).

F. If This Court Does Not Affirm The Trial Court's Grant Of Summary Judgment, It Should Remand For Further Proceedings

This Court should affirm the trial court's summary judgment order because the records at issue are not available to Mr. Anderson under the PRA and are governed exclusively by RCW 26.23.120. If this Court holds otherwise, however, it should remand the case to the trial court for further proceedings to determine whether the Department complied with the PRA and whether Mr. Anderson is entitled to any remedy under RCW 42.56.565.

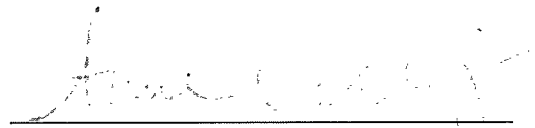
V. CONCLUSION

RCW 26.23.120 wholly exempts the records it protects from operation of the PRA, and the Department's response to a request for such records cannot violate the PRA. Because there is no issue of fact that the records at issue are "obtained or maintained" by DCS and "concern[] individuals who owe a support obligation or for whom support enforcement services are being provided," the Department is entitled to

judgment as a matter of law that it did not violate the PRA, and this Court should affirm the trial court's grant of Summary Judgment to the Department.

RESPECTFULLY SUBMITTED this 20th day of December, 2015.

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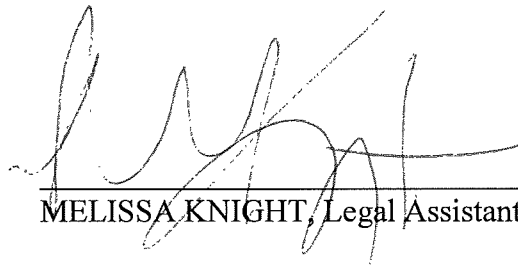
CERTIFICATE OF SERVICE

I hereby certify that on the date below, I served a copy of the
RESPONDENT DEPARTMENT OF SOCIAL AND HEALTH
SERVICE'S BRIEF upon all parties or their counsel of record as follows:

KEVIN ANDERSON, 727189 Airway Heights Correction Center P.O. Box 2049 Airway Heights, WA 9901	<input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> ABC/Legal Messenger <input type="checkbox"/> Hand delivered <input type="checkbox"/> Email:
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 3rd day of December 2015, at Tumwater,
Washington.



MELISSA KNIGHT, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

December 03, 2015 - 2:53 PM

Transmittal Letter

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Case Name: Anderson v. DSHS

Court of Appeals Case Number: 47660-6

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

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Comments:

Respondent's Amended Brief

Sender Name: Melissa V Knight - Email: melissak2@atg.wa.gov