

No. 64819-5-I

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

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HARLEY H. HOPPE & ASSOCIATES, INC.,

*Plaintiff/Appellant,*

v.

KING COUNTY,

*Defendant/Respondent.*

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**AMENDED REPLY BRIEF OF APPELLANT  
AND RESPONSE TO CROSS APPEAL**

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## I. REPLY ON APPEAL

### A. Introduction

The Public Records Act makes all records of government agencies presumptively available to persons requesting them. Ch. 42.56 RCW.

When the government refuses to comply with a public records request:

Courts *shall take into account* the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials *or others*.

RCW 42.56.550(2) (emphasis added).

The burden is on the entity denying the request to prove that refusing to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure. RCW 42.56.550(1); *Bellevue John Does 1–11 v. Bellevue School Dist. No. 405*, 164 Wn.2d 199, 209, 189 P.3d 139 (2008).<sup>1</sup> Here, King County has failed to carry its burden.

### B. King County Had No Basis to Refuse to Permit Hoppe to Inspect and Copy the Ratio Audit Documents.

King County has approached Hoppe's request for the ratio audit from the standpoint of how best to hide the public records rather than how best to disclose them. Its approach flouts the letter and spirit of the Public Records Act:

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<sup>1</sup> On summary judgment, King County must demonstrate there is no genuine issue of material fact. CR 56.

To be effective, a law must be applied correctly, consistently and fairly. When it comes to the Public Records Act, this means that ***agencies must approach a records request by focusing on how they can provide the record***, rather than how they can withhold it.

Greg Overstreet et al, *Public Records Act Deskbook: Washington's Public Disclosure and Open Meetings Laws*, viii (preface by Rob McKenna) (2006) (emphasis added).

The following table summarizes the reasons the statutes King County relies upon do not operate to exempt or prohibit disclosure, as described in our opening brief:

<b><i>Cited statutes</i></b>	<b><i>Reasons statutes do not apply</i></b>
84.08.210 + 42.56.230(a)  <i>also</i> 42.56.230(b)	Requested information would not violate a right to privacy, is of legitimate concern to the public, and would not result in unfair competitive disadvantage to the taxpayer  (In its discussions of RCW 84.08.210 and RCW 42.56.230(b), King County applies the incorrect tests to the "right to privacy" concept, which is discussed in more detail below, Part I.B.1.)
82.32.330 + 42.56.230(a)	Governs excise tax, not personal property tax
84.40.020 + 42.56.230(a)	Exempts only confidential data related to real property, not to personal property
42.56.070(1)	Exempts disclosure of information protected by some other statute, and none is named

Br. of Appellant at 14–22. Additionally, King County relies on RCW 84.40.340, which likewise has no bearing on the analysis, as discussed below, in Part I.B.2.

**1. Disclosure of the Ratio Audit Hoppe Requested Would Not Result in a Violation of the Right to Privacy.**

While the right to privacy enjoys some protection under the Public Records Act, it does not prevent disclosure of all information which might be described as “private”:

Speaking generally about the right of privacy, we have stated that *the right of privacy applies “only to the intimate details of one’s personal and private life,”* which we have contrasted to actions taking place in public that were observed by 40 other people.<sup>2</sup>

*Dawson v. Daly*, 120 Wn.2d 782, 796, 845 P.2d 995 (1993) (emphasis added; internal quotations and citations omitted).

King County suggests disclosure of “the sort of information gathered from audited companies” necessarily amounts to a per se violation of a taxpayer’s right to privacy under RCW 42.56.230(3)(b).

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<sup>2</sup> This quote gives further support to Hoppe’s position that “privacy” and “personal information” contemplate individual taxpayers, rather than entities. Surely no corporate taxpayer has a “personal and private life.” King County scoffs at Hoppe for raising a “novel” argument. Br. of King County at 20 n.6, but cites no authority to support *its* position. Indeed, the individual focus of this right is longstanding in our case law. *E.g. Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 136, 580 P.2d 246 (1978) (quoting the Restatement (Second) of Torts § 652D: “Every *individual* has some phases of his life and his activities and some facts about himself that he does not expose to the public eye.”).

Not so: instead, King County has the burden to show two elements before a court can find that a disclosure would violate a taxpayer's right to privacy:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated *only if* disclosure of information about the person: (1) Would be highly offensive to a reasonable person, *and* (2) is not of legitimate concern to the public.

RCW 42.56.050 (emphasis added). Contrary to King County's suggestion, *both* elements must be met; no balancing of private against public interest is permitted. *Dawson v. Daly*, 120 Wn.2d at 795.

**a. King County Fails to Present Evidence That Disclosure of the Requested Information Would Be Highly Offensive to a Reasonable Person.**

King County must show that disclosure of the tax audit would not be "highly offensive to a reasonable person." It is not enough that examination of the public records could "cause inconvenience or embarrassment." RCW 42.56.550(3).

King County does not meet its burden. The only evidence it relies on to support this element consists of communications from the favored taxpayers that they do not want the information disclosed.<sup>3</sup> Yet, there is

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<sup>3</sup> Under the Public Records Act, the four favored taxpayers had the option to move the trial court to enjoin disclosure. RCW 42.56.540. Not one chose this option. Had they done so, they would have had to prove that Hoppe's

no evidence that the favored taxpayers attempt to prevent all public disclosure with regard to the items of personal property in their possession. There is no evidence that a reasonable person would find disclosure highly offensive rather than inconvenient or embarrassing.

**b. King County Fails to Present Evidence That the Requested Information Is Not of Legitimate Public Concern.**

King County fails also to establish the absence of a legitimate, or “reasonable,” public concern. *Dawson v. Daly*, 120 Wn.2d at 798.

“Certainly, there exists a *reasonable concern* by the public that government conduct itself fairly and use public funds responsibly.”

*Tiberino v. Spokane Cty.*, 103 Wn. App. 680, 690, 13 P.3d 1104 (2000) (emphasis added; citations omitted). *See also* RCW 42.56.550(2).

Likewise, how the government makes its decisions and carries out (or fails to carry out) its responsibilities are matters of strong public interest.

The government’s preferential treatment of four taxpayers is not fair conduct—especially considered against the constitutional mandate for uniform tax treatment. The results-oriented and inexplicable reduction of

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“examination [a] would clearly not be in the public interest and [b] [i] would substantially and irreparably damage any person, or [ii] would substantially and irreparably damage vital governmental functions.” *Id.* We do not believe they could have done so.

certain manufacturers' tax burden—thereby reducing the public funds—is not responsible use of public funds.

King County cannot overcome the legitimacy of the public concern unless it can show “the public interest in efficient government could be harmed significantly more than the public would be served by disclosure.” *Dawson v. Daly*, 120 Wn.2d at 798. There is no evidence in the record to support such a contention, and King County does not even attempt it. Because King County cannot meet the burdens of RCW 42.56.050, it cannot show that disclosure would violate a taxpayer's right to privacy as required by RCW 42.56.230(3)(b).<sup>4</sup>

**2. RCW 84.40.340 Does Not Prohibit or Exempt Disclosure of the Ratio Audit.**

As another claimed exemption, King County also invokes RCW 84.40.340 (via RCW 42.56.230(a)). This statute does say that disclosure of certain information without the taxpayer's permission is prohibited and is a gross misdemeanor. RCW 84.40.340(2). However, the information protected by this statute is very specific: it includes only “information or facts obtained” in the process of “visit[ing], investigat[ing] and examin[ing]” a taxpayer's “personal property . . .

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<sup>4</sup> The same analysis applies to the claimed exemption under RCW 84.08.210 (via RCW 42.56.230(3)(a)), as subsection (1) refers to the “highly offensive to a reasonable person and not a legitimate concern to the public” standard.

records, accounts and inventories” for the purpose of “verifying any list, statement, or schedule” provided by the taxpayer. RCW 84.40.340(1), (2). The original list, statement, or schedule itself is not protected.

**C. Amy Hoppe’s Public Records Request Is Not Barred by Res Judicata or Collateral Estoppel.**

On January 27, 2010, Amy Hoppe made a Public Disclosure Act request for 2007 and 2008 Ratio Audits, the years after the 2006 request that is the subject of Harley Hoppe’s requests. CP 1505. King County refused the request, and Amy Hoppe filed an action. CP 1512–13; CP 1453–57. On cross-motions for summary judgment, the trial court granted King County’s motion and denied Amy Hoppe’s. CP 1677–88. Amy Hoppe’s appeal was consolidated with Harley Hoppe’s.

King County makes all of the same arguments addressed in Part I.B, above, with regard to Amy Hoppe’s appeal. It adds one last argument: that collateral estoppel and res judicata bar Amy Hoppe’s request under the Public Disclosure Act. Essentially, King County argues that if the government refuses to produce documents in response to one citizen’s request, it can use that refusal as the basis for refusing to produce documents in response to another citizen’s request. This is not the law.

**1. Res Judicata Does Not Apply.**

The doctrine of res judicata only applies where “a subsequent claim involves the same subject matter, cause of action, persons and

parties, and quality of persons for or against the claim made.” *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). Only “an *unappealed* summary judgment is res judicata as to rights determined during summary judgment.” *Id.* (emphasis added). Here, the doctrine does not apply for at least three reasons. First, the subject matter is different. Although both cases address public records requests, the first request was for 2006 records, and the second was for 2007 and 2008 records. Second, the parties are different. Although Harley Hoppe and Amy Hoppe are related, they both are individual citizens who are permitted to (jointly or separately) request governmental records under Chapter 42.56 RCW. Finally, the decision in Harley Hoppe’s case is on appeal and is not an “unappealed summary judgment” barring Amy Hoppe’s later public records request.

## **2. Collateral Estoppel Does Not Apply.**

Collateral estoppel, or issue preclusion, bars relitigation of any issue that was actually litigated in a prior lawsuit. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 304, 57 P.3d 300, (2002). The party asserting collateral estoppel bears the burden of persuading the court (1) that the issue decided in the prior action was identical to the issue presented in the second action; (2) that the prior action ended in a final judgment on the merits; (3) that the party to be estopped was a party or in

privity with a party in the prior action; and (4) that application of the doctrine would not work an injustice. *Id.* The essence of the four requirements boils down to requirement of a full and fair opportunity to litigate the issue in the earlier proceeding. *Id.*

Amy Hoppe did not have a full and fair opportunity to litigate the disclosure issue in the earlier proceeding. The issue the trial court decided in the first action was whether King County could refuse to disclose 2006 data. The issue in the second action was whether King County could refuse to disclose 2007 and 2008 data. Therefore, the issues—although similar—are not *identical*, as required before collateral estoppel may be applied to bar an issue. Further, Amy Hoppe was not a party in the first action, nor was she in privity. King County argues that because she is an employee of Harley H. Hoppe & Associates, or because she is Harley Hoppe's daughter, she is a party in privity with a party in the prior action. However, collateral estoppel should not be applied in the Public Disclosure Act setting simply because a person is related to or employed by a party. If that were enough, an individual citizen's statutory right to make a public records request would be needlessly curtailed.

### **3. Practical Consequences of King County's Position.**

If King County prevails against Amy Hoppe on its defenses of collateral estoppel, the practical effect will be that a government body

could refuse to disclose public information without reviewing the merits of the request, as long as it had previously refused a similar request.

While appellants acknowledge the similarities between the claims and issues, the claims and issues of the second action were not decided in the first action. The legitimacy of Amy Hoppe's request, and whether King County has a legal basis for refusing it, should be decided on their merits, not barred by *res judicata* and collateral estoppel.

## II. RESPONSE TO CROSS-APPEAL

The issue King County raises in its cross-appeal is whether the trial court erred in waiting to enter<sup>5</sup> judgment on Hoppe's claim and King County's counterclaim until *after* it had made separate rulings on both. King County argues that the Notice of Appeal Hoppe filed after entry of judgment was untimely. In fact, without satisfying other conditions, the trial court *could not* enter judgment until both Hoppe's claim and King County's counterclaim were resolved. CR 54(b). There is no error. Hoppe's notice of appeal was timely.

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<sup>5</sup> King County mischaracterizes the January 22, 2010 judgment as a "re-entry" of judgment, *e.g.* Brief of King County at 8, part IV.E, even though no judgment had been entered previously.

**A. Hoppe Could Not Appeal at the Time the Trial Court Granted Summary Judgment in Favor of King County on Hoppe's Affirmative Claim.**

This case involved Hoppe's affirmative claim and King County's counterclaim. CP 44–64. King County moved for summary judgment dismissal of Hoppe's claim, CP 199–218, and the trial court granted King County's motion on July 17, 2009. CP 1216–18. King County's counterclaim remained "live." The trial court neither entered final judgment, nor made the findings necessary under CR 54 and RAP 2.2(d) to permit review by the Court of Appeals before final disposition of all claims.

Although Hoppe could have sought *discretionary review* within 30 days of this order, RAP 2.3(a) and 5.2(b), the parties agree that Hoppe could not have filed an appeal as of right under RAP 2.2 when the trial court granted King County's summary judgment on Hoppe's claim. CP 1346 n.2; CP 1381.<sup>6</sup>

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<sup>6</sup> On page 35 of its brief, King County cites *Ron & E Enterprises, Inc. v. Carrara, LLC*, 137 Wn. App. 822, 826, 155 P.3d 161 (2007), for the proposition that a summary judgment ruling containing "language that is, for all intents and purposes, identical to that at issue here" was "a final, dispositive judgment." We believe if *we* had made this argument in the context of a RAP 2.2 appeal filed within 30 days of the trial court's ruling on summary judgment, King County would have made short work of it, and the Court would have promptly rejected it. As discussed below, we do not believe the *Carrara* rule is as broad as stated by King County, but rather applies only within the context of its specific facts.

**B. The Stipulated Dismissal of King County’s Counterclaim Did Not Operate as a Final Judgment From Which Hoppe Could Appeal.**

A few months later, King County attempted a summary judgment motion on its counterclaim. CP 1225–33. The trial court denied the motion. CP 1305–06. The parties then stipulated to King County’s voluntary dismissal of its counterclaim on November 20, 2009. CP 1324–25. The trial court signed the order disposing *only* of the counterclaim:

THIS MATTER came before the Court upon the foregoing stipulation. The Court has reviewed the Stipulation, together with the files and records herein, and has determined that entry of the following order is proper. Now, therefore, it is hereby

ORDERED that *Defendants’ counterclaim against plaintiff Harley H. Hoppe & Associates, Inc. be and hereby is dismissed* pursuant to CR 41(a) and (c) without prejudice and without costs or attorneys fees to either party.

CP 1325 (emphasis added). Although the trial court had not entered a final judgment addressing Hoppe’s affirmative claim, Hoppe filed a Notice of Appeal following entry of the stipulated order dismissing King County’s counterclaim. CP 1–8.

When the Court of Appeals *sua sponte* raised the issue of whether the stipulated dismissal was appealable, “*the County urged that the appeal be dismissed on grounds that the designated orders regarding dismissal of the County’s stipulated counterclaim were not reviewable.*”

Br. of King County at 7 (emphasis added), citing CP 1351–58. King County, therefore, agreed that the designated orders did not constitute a final judgment from which an appeal lay.

Now, King County appears to argue that the trial court’s ruling in its favor on summary judgment, acknowledged *not* to be an appealable final judgment at the time, suddenly became one by virtue of entry of the stipulated order, quoted above, which addressed *only* the dismissal of King County’s counterclaim. We have found no authority for its contention—and King County argued the *opposite* in previous briefing. *Id.*

The cases King County relies on do not support its argument. In *Ron & E Enterprises, Inc. v. Carrara, LLC*, 137 Wn. App. 822, 155 P.3d 161 (2007), for instance, the facts do not compare. In *Carrara*, only one party filed a claim on the contract. That claim was disposed of at summary judgment. Then the prevailing party pursued, and was granted, attorney fees under the contract. The losing party appealed following the ruling on attorney fees, but that was 105 days following the ruling on summary judgment.

This Court ruled the appeal was timely as to the attorney fees ruling, but untimely as to the summary judgment ruling. The analysis focused on the distinction drawn between a decision on the merits and a subsequent decision on attorney fees, highlighted in RAP 2.2(a)(1), which

“allows a party to appeal a final judgment of any proceedings regardless of whether the judgment reserves for future determination an award of attorney fees or costs,” and RAP 2.4(b), which “makes clear that such an appeal [for attorney fees] does not allow a decision entered before the award of attorney fees to be reviewed (i.e. it does not bring up for review the judgment on the merits) unless timely notice of appeal was filed on *that* decision.” 137 Wn. App. at 825. In this action, both parties had claims which were addressed in separate orders. No party believed, nor does the law hold, that the summary judgment order dismissing Hoppe’s claim was a “final, dispositive judgment” when it was entered. The trial court’s subsequent order, addressing a different topic altogether, could not make it into a “final, dispositive judgment.” *Carrara* does not apply.

No more does *In Re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004), a case invoking the rule that “an unappealed summary judgment is res judicata as to rights determined during summary judgment.”

**C. Hoppe Filed a Notice of Appeal Within 30 Days After the Trial Court Entered Final Judgment on Hoppe’s Affirmative Claim.**

Under the Rules, the *only* appropriate time to appeal from the trial court’s decision regarding Hoppe’s claim was following a “final judgment in [the] action or proceeding.” RAP 2.2(a)(1). “A judgment is the final

determination of the rights of the parties in the action and includes any decree and order *from which an appeal lies.*” CR 54(a)(1) (emphasis added). In essence, then, an order is not a judgment unless a party may appeal it, and a party may not appeal until a judgment is entered.

Therefore, Hoppe’s only choice was to await a final judgment.

When the Court of Appeals pointed out the procedural anomaly in Hoppe’s notice of appeal from the stipulated dismissal, Hoppe withdrew the notice and moved for presentation of judgment pursuant to CR 54(e), which states in relevant part:

If both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation.

It was incumbent upon one of the parties to present judgment for entry by the trial court. *Id.*

Hoppe’s Notice of Presentation of Judgment addressed the final disposition of *both* Hoppe’s affirmative claim and King County’s counterclaim on January 11, 2010. CP 1326–28. On January 22, 2010, the trial court entered the Judgment presented. CP 1383. Once that was accomplished, the 30-day deadline for filing a notice of appeal began to run. RAP 5.2(a). Well within the 30-day period, on January 27, 2010, Hoppe filed the Notice initiating this appeal. CP 1385. The trial court

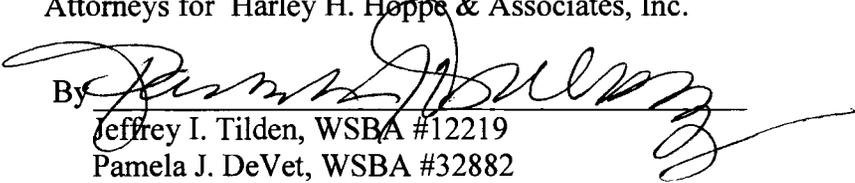
properly entered judgment following its separate rulings on Hoppe's claim and King County's counterclaim. After that, the Notice of Appeal was timely filed. King County's cross-appeal should be denied, and the entry of judgment affirmed.

### III. CONCLUSION

For the reasons set forth, the summary judgment ruling by the trial court should be reversed, and the entry of judgment should be affirmed.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of October, 2010.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on October 29, 2010, a copy of the foregoing REPLY BRIEF OF APPELLANT AND RESPONSE TO CROSS APPEAL was delivered via ABC Legal Services to:

Michael J. Sinsky, Senior Deputy Prosecuting Attorney  
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Signed this 29th day of October, 2010 at Seattle, Washington.

  
\_\_\_\_\_  
Carol Hudson, Legal Secretary  
Gordon Tilden Thomas & Cordell LLP