

66048-0

66048-0

NO. 66042-0-I

COURT OF APPEALS , DIVISION I
OF THE STATE OF WASHINGTON

JOHN THOMAS ENTLER,
Appellant,

vs.

DEPARTMENT OF CORRECTIONS
Respondent.

REPLY BRIEF OF APPELLANT

John Thomas Entler
Pro-se

John Thomas Entler, #964471
Washington State Reformatory
P.O. Box 777, A-311
Monroe, Wa. 98272

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I. IDENTITY OF APPELLANT/INTRODUCTION.

Appellant, John Entler, is incarcerated by Respondent, the Department of Corrections (hereinafter "DOC"). Mr. Entler seeks review of a summary judgement entered against him in an action under the Public Records Act (hereinafter "PRA"). Mr. Entler contends that DOC has a duty under paragraph 1 of RCW 42.56.100 to protect a public record from damage, and Mr. Entler requests that DOC be required to comply with the Records Retention Schedule under RCW 40.14 seq. in order to protect the Public's interests to know the conduct of their government. Opening Brief of Appellant, at pp. 4-25.

II. STATEMENT OF THE CASE.

Mr. Entler does not agree with DOC's statement of the case. The facts surrounding whether or not the grievance response by CUS Miller was a "transitory record" or a "duplicate" of CPM Willims was substantially disputed in the trial court. See CP-19, at pp. 2-14, §§4.1--4.26. The trial court did not resolve or address these disputed factual issues, rather it decided this matter on an issue of law.

But Mr. Entler would ask the court to remember that Mr. Entler had to file a PRA suit to get a true answer as to why DOC could not disclose the grievance response. CP-1, at pp. 8, §§3.22--3.25; CP-8, at pp. 7-8, §§1.21--1.25; CP-19, at pp.

2-3, §4.1; Opening Brief of Appellant, at pp. 2-3, §§3.1--3.3; Brief of Respondent, at p. 2-3.

III. ISSUES PRESENTED.

The following issues are presented for resolution by the court:

1. Whether Or Not The Deliberate Destruction Of A Public Document That Did Exist Before a Public Record Request Is Made Is Cognizable Under the PRA?
2. Whether Or Not The Grievance Response By CUS Miller Was A Transitory Record Or A Duplicate Of CPM Williams Grievance Response?

IV. ARGUMENT.

A. Procedural History.

Mr. Entler relies on his statement of the Case in the Opening Brief of Appellant, at pp. 2-3, and Statement of the Trial Court's ruling in the Opening Brief of Appellant, at pp. 8-9, with regards to stating the procedural history.

B. Reply.

A. PUBLIC AGENCIES HAVE A DUTY UNDER THE PRA TO PROTECT A PUBLIC RECORD FROM DAMAGE.

It is undisputed that under RCW 42.56.100(¶1) DOC has a duty to protect a "public record" from "damage." Opening Brief of Appellant, at pp. 17-25. DOC does not even address

this issue. DOC admits the Grievance Records are subject to a 6 year Retention Schedule. Brief of Respondent, at p. 8.

(i). Interplay Of The PRA And The Records Retention Act.

Because Mr. Entler has already addressed this issue in the Opening Brief of Appellate, at pp. 7-8, §§4.7--4.8, at pp. 15-25, §§4.22--4.36, Mr. Entler, respectfully submits, he will not re-argue the matter here, unless the Court calls for addition briefing.

(ii) Sperr v. City of Spokane, Smith v. Okanogan County, Kleven v. City of Des Moines, And Hangartner v. City of Seattle Are Not On Point And Should Be Rejected.

Mr. Entler argues with DOC that an Agency has no duty to create or produce a record that "HAS NEVER EVER EXISTED" which was the case in Sperr v. City of Spokane, 123 Wn.App. 132.136-137, 96 P.3d 1012(2004) and Smith v. Okanogan County, 100 Wn.App. 7, 13-14, 994 P.2d 857(2000), and Mr. Entler agrees with DOC that is has no obligation to allow anyone to sift through their records, which was what the court held in Sperr v. City of Spokane, 123 Wn.App. at 136-137. But unlike Sperr and Smith the public record in Mr. Entler's case did exist, but was destroyed, Brief of Respondent, at p. 7; CP-19, at p. 11, §4.20, and DOC has not asserted that Mr.

Entler wishes to sift through DOC records. Neither Sperr or Smith support DOC's position that destroying a public record before a PRA request is made is not a violation of the PRA.

As pointed out by Mr. Entler in his Opening Brief, DOC's argument put in its proper context really is that because they destroyed the public record before Appellant made his PRA request, they are "exempt" from have to comply with the Records Retention Schedule (RRS), and are "exempt" from complying with the PRA, not that they do not have to allow an inmate to sift through their records, or produce a document the NEVER EVER EXISTED. DOC's reliance on Sperr,^{supra} and Smith,^{supra} should be rejected. See CP-19, at p. 11, §4.20; Opening Brief of Appellant, at p. 13, §4.17.

Likewise, DOC's reliance on Kleven v. City of Des Moines, 111 Wn.App. 284, 294, 44 P.3d 887(2002), and Hangartner v. City of Seattle, 151 Wn.2d 439, 447-449, 90 P.3d 26(2004), should be rejected, CP-19, at pp. 11-12, §4.21, because they are not on point. Kleven and Hangartner involved records request where the records request did not clearly identify the documents requested, which required clarification, Kleven, 111 Wn.App. at 294; Hangartner, 151 Wn.2d at 447-449, and Mr. Entler's case DOC had no problem with identifying the record Mr. Entler was requesting, and did not need

clarification. Brief of Respondent, at p. 1-2(Factual History);CP-19, at pp. 11-12,§4.21.

To the extent under either Kleven or Hangartner that the entity could not, or did not, provide records because of the ambiguity in the request, that issue is more analogous to both Smith v. Okanogan County, 100 Wn.App. at 13-14 and Sperr v. City of Spokane,123 Wn.App. at 136-137, regarding not having to allow a person to sift through the entities records to find a record they have not clearly identified, or to produce a record the entity it's self does not yet know even exists because of an ambiguity in the records request. Id. Neither Kleven or Hangartner support DOC's position that deliberately destroying a public record — that they knew Mr. Entler was going to request, CP-8, at Exhibit 4, at p. 4,¶12, and where DOC had an obligation to preserve the document as evidence in a future law suit, CP-19, at pp. 13-14, §§4.23—4.25 — before a PRA request is made is not a violation of the PRA.

Additionally, neither is DOC's reliance on Building Industry Ass'n of Washington v. McCarthy,152 Wn.App. 720,218 P.3d 196(2009)(hereinafter "BAIW")(Attached as Appendix A) persuasive. DOC asserts that BAIW stands for the proposition that an Agency does not deny a requester an opportunity

inspect or copy a public record because the public record sought did not exist. Brief of Respondent, at p. 6(citing Bldg. Indus. Ass'n v. McCarthy).

To the extent BAIW does apply to records that do not exist, the BAIW Court ruled that because there was no violation of the Records Retention Schedule McCarthy did not have to produce the record (E-mail) it was lawfully allowed to destroy, thus BAIW's case fell under the decisions of Sperr, Smith, Kleven, and Hangartner. Bldg. Indus. Ass'n v. McCarthy, 152 Wn.App. at 736-37, ¶¶24, 738-741, ¶¶28-32. So naturally, McCarthy had no obligation to produce a record they lawfully destroyed. Bldg. Indus. Ass'n v. McCarthy, 152 Wn.App. at 739, ¶¶29-30.

The court should also note that the Bldg. Indus. Ass'n v. McCarthy case would have proceeded further if BAIW could have established that McCarthy improperly destroyed the E-mail. Bldg. Indus. Ass'n v. McCarthy, 152 Wn.App. at 741, ¶33. Thus, because Mr. Entler can establish that DOC improperly destroyed the grievance record in this case, the issues in this case go beyond the issues decided in Sperr, Smith, Kleven, and Hangartner. DOC's reliance on Bldg. Indus. Ass'n v. McCarthy supra does not support DOC's position.

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While Mr. Entler would agree with the Court that if it were to conclude that the grievance record by CUS Miller was a "transitory record" or a "duplicate" of CPM Willimas' grievance, which Mr. Entler below asserts they were not and which the trial court did not even reach the issue, Mr. Entler is in the same position as BAIW. In fact, after the court rejected BAIW's claims that McCarthy improperly destroyed the E-mail, the Court of Appeal, then disposed of BAIW's claims relying on Sperr, Smith, Kleven, and Hangartner. Bldg. Indus. Ass'n v. McCarthy, 152 Wn.App. at 736-741, ¶¶24-32. Thus, the issues in Mr. Entler's case represents the issues left open in Bldg. Indus. Ass'n v. McCarthy, 152 Wn.App. at 741, ¶33, and Mr. Entler's case does not fall under either Sperr, Smith, Kleven, or Hangartner.

As Mr. Entler argued in the trial court and in his Opening Brief, that: "unless Courts require public agencies to comply with the Records Retention Act, chapter 40.14 RCW, agencies may easily circumvent the PRA, chapter 42.56 RCW, by improperly destroying records," like DOC is trying to do in this case. CP-1, at pp. 12-15, §§4.7--4.15; CP-8, at pp. 12-14, §§4.1--4.5; CP-19, at pp. 7-9, §§4.12--4.15; Opening Brief of Appellant, at pp. 12-15, §§4.16--4.36; Bldg. Indus. Ass'n v. McCarthy, 152 Wn.App. at 741, ¶33.

**(iii) The Grievance Response By CUS Miller Was Not A
Transitory Document Or A Duplicate Of CPM Williams**

DOC argued in the trial court, as they do in their Brief of Respondent, at pp. 8-9, that the grievance response by CUS Miller was a "transitory record." CP-13, at pp. 6-7; CP-19, at pp. 3-4, §§4.2-4.3. But the facts of this case do not support DOC's position.

DOC admits in the Brief of Respondent, at p. 8, their quotation of the definition of a "transitory records," that a record is not a "transitory record" if it is covered by a "more specific record series" and the document is not evidence of a business transaction. Brief of Respondent, at p. 8; CP-13, at p. 6; CP-19, at p. 3, §4.2. DOC admits in their Brief of Respondent, at p. 8, that the record in question is subject to a more specific records series for grievance of 6 years, and that the grievance record was not evidence of a business transaction. Brief of Respondent, at p. 8; CP-13, at p. 7, ¶1. Under DOC's own admissions and interpretation of a "transitory record," their definition does not apply to this matter.

However, DOC's asserts that the record in question here is a transitory record to only "mis-guide" the court

regarding the real reason the record was destroyed. Ms. Holly, the one that destroyed the record, testified that she destroyed the grievance record by CUS Miller because it was a "duplicate" of the grievance response submitted by CPM Williams. See CP-13, at p. 2 (lines 12-25) (citing Exhibit 2, Declaration of Ms. Holly, at ¶¶6-11); CP-19, at pp. 3-4, §4.3.

A "duplicate" is defined as "identically copied from an original," "existing in two corresponding parts; double," "an identical copy." American Heritage Dictionary, 3rd Ed. 1994, at p. 264. See also Websters II Pocket Dictionary, 3rd Ed. 2005, at p. 88 ("an identical copy; facimile"). Specifically, "THE PARTIES DO NOT AGREE" that the April 2009 Grievance Response by CUS Miller and the May 8, 2009 Grievance Response by CPM Williams were "duplicate grievances." See CP-19, at pp. 4-7, §§4.4--4.11. NO WHERE is there such an agreement in the record.

The undisputed fact is that the April 2009 Grievance response by CUS Miller specifically contained a written agreement between Mr. Entler and CUS MILLER that Mr. Entler would withdrawal the grievance and give CUS Miller the chance to remedy C/O Adame's conduct, and that if C/O Adame did not stop his conduct, Mr. Entler preserved the rights to reinitiate the grievance against C/O Adame. CP-19, at pp.

4-5, §4.5.(citing Exhibit 4, at p. 2, ¶7 & Exhibit 7, at p. 2(Additional Grievance Information submitted to Grievance Office August 18, 2009)).

In fact, CPM Williams' grievance response mentions nothing to the effect that Mr. Entler wished to withdrawal the grievance, rather it references Mr. Entler saying that the issue had been resolved, it provides: "This is the second meeting with Mr. Entler. He is saying that this issue has been resolved. It was resolved with the infraction officer had received additional training. He is also saying that this issue is resolved." See CP-19, at pp. 4-5(citing CP-8, at Exhibit 5, p. 1). And CUS Miller states what he did with the April 2009 grievance after it was completed. See CP-19, at p. 6, §4.9(citing CP-8, at Exhibit 15, p. 1).

Also, by Ms. Holly's own admissions, she testified that the grievance response by CUS Miller said something to the effect that CUS Miller agreed to address the issue with C/O Adame. See CP-13, at Exhibit 2, at p. 3, ¶12(lines 6-8)(Declaration of Holly). The May 2009 grievance response by CPM Williams did not even contain such an agreement as Ms. Holly testifies CUS Miller's had, so by DOC's own admissions CUS Miller's and CPM Williams grievance responses were not "identical copies" and thus not "duplicates." CP-19, at p.

14, §4.26.

Additionally, Ms. Holly testified that she "characterized" the two grievance response as "duplicative in effect (offender withdrawal)." CP-13, at Exhibit 2, at p. 3, ¶11 (lines 1-2) (Declaration of Holly). RCW 42.56.010(2) prohibits state agencies from defining public records by their " physical form or characteristics." See CP-19, at p. 14, §4.26. The facts that Ms. Holly believes that she can distinguish between public records by their form or characteristics, and destroy public records because a supervisor also submits a grievance response is equally troubling.

This is because, under the facts of this case, if CUS Miller submits a grievance response that admits official misconduct, and then another public official in a supervisory position seeks to find out why a grievance response was not made on time and then files a response of his or her own, Ms. Holly can destroy the public record that admits governmental wrongdoing, and deprive the public of knowing the true conduct of government. See CP-19, at pp. 6-7, §4.10; CP-13, at Exhibit 2, at p. 3, ¶11 (Declaration of Holly) (Ms. Holly admits that she discarded CUS Miller's grievance response because she received CPM Williams' grievance response first). Also

Ms. Holly suggest that she can destroy a public record admitting governmental wrongdoing because an investigation is closed. CP-13, at Exhibit 2, at p. 3, ¶11(line 2)(Declaration of Holly).

In this matter, it is clear that CUS Miller's grievance response was with regards to investigating the grievance allegation and providing a response based on his investigation, whereas, CPM Williams grievance response was with regards to filing out why the grievance was not investigated and responded to on time. CP-19, at p. 5-7, §§4.6—4.10. There was no basis in the record for DOC to argue that the grievance record submitted by CUS Miller was a "transitory record" or a "duplicate" of CPM Williams' grievance response.

In fact, the undisputed evidence in the trial court was that Ms. Holly knew prior to destroying the grievance response by CUS Miller that Mr. Entler wanted the grievance response and was going to request it through Public Disclosure, See CP-8, at Exhibit 4, at p. 4, ¶12, that Mr. Entler was going to use the grievance response by CUS Miller as evidence in a civil rights lawsuit as far back as January 2009, See CP-19, at pp. 13-14, §§4.24--4.25, but Ms. Holly destroyed the record anyway before Mr. Entler request it.

See Brief of Respondent, at p. 2.²

Mr. Entler respectfully re-asserts that, this matter gives rise for this Court to resolve the issues left open in Bldg. Indus. Ass'n v. McCarthy, 152 Wn.App. at 741, ¶33, because DOC improperly destroyed the grievance response by CUS Miller, and this case does not fall within the Sperr, Smith, Kleven, and Hangartner cases, and DOC's argument that the grievance record in question was a "transitory record" or a "duplicate" of CPM Williams grievance response are simply untenable based on DOC's own evidence submitted in the trial court.

DOC argues that Mr. Entler would have this court believe that the destruction of a grievance before a public record requests is made is actionable under the PRA. Brief of Respondent, at p. 7. See also CP-19, at pp. 7-8, §4.12. However, DOC misstates Mr. Entler's argument. CP-19, at pp. 7-8, §4.12. Mr. Entler's argument is that: "maintaining public records is 'essential' for an agency to provide 'full

Note No. 2: Mr. Entler requests that the Court of Appeals take judicial notice of the Federal Proceedings in District Court at Seattle (cause no. 10-cv-00848-RAJ/MAT) rejecting DOC's Motion to Dismiss and finding cognizable Federal Claims against C/O Adame, which demonstrates the importance of the PRA record DOC intentionally destroyed which admits governmental misconduct Mr. Entler sought to expose.

assistance' to persons requesting public records, and to provide for the 'most timely' possible access to public records that are 'retained' under the Records Retention Act." CP-19, at p. 8, §4.13(citing RCW 42.56.100, ¶1; Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 98, 100 ¶22, 117 P.3d 1117(2005)); CP-8, at pp. 13-14, §4.5. Otherwise, the purposes of the PRA defeated because a State Agency cannot provide "full and timely access to public records" if it does not maintain and protect public records from improper "damage," "disorganization," or "destruction." CP-19, at p. 8, §4.13.

Therefore, Mr. Entler respectfully submits, that it's not "the destruction of a grievance before a public records request is received by an agency" that makes the destruction actionable under the PRA, rather it's "the improper destruction of the public record that prevents the state agency from complying with the mandates of the PRA" that makes the improper destruction of a public record actionable under the PRA. CP-19, at . 8, §4.14.

The fact of the matter is that chapter 40.14 RCW retention schedule requirements is essential to not only ensuring that records are accessible to the public upon request, but essential to ensure that state agencies provide

"full assistance" to persons requesting public records, but to provide for the "most timely possible access" to public records that are "retained" by state agencies under the Records Retention Act, chapter 40.14 RCW,, and made subject to to disclosure under the PRA, chapter 42.56 RCW. CP-19, at p. 9-10,§4.17.

Mr. Entler respectfully submits not only that a court's involvement in ensuring that a state agency complies with chapter 40.14 RCW is absolutely "essential" in assuring that (1) state agencies comply with the mandates to disclose public records under chapter 42.56 RCW, (2) to ensure that the citizens of this state do not yeild their sovereignty to agencies that serve them, and (3) to ensure that the citizens of this state do not give up to their public servants the right to decide what is good for them to know and what is not good for them to know, and so remain informed so that they may maintain control over the instruments they have created, as clearly stated in RCW 42.56.030, but (4) is consistent with the jurisdiction given to the Court by the Legislature, CP-19, at p. 10,§4.18, to enforce the PRA.

RCW 42.56.550(1) gives the superior courts broad jurisdiction to inquire why an agency will not allow inspection and copying of public records, and it is the

burden of the agency to show an exemption, and DOC has not established an exemption under the PRA, rather it provides "excuses" why its cannot comply with the PRA.

It is also consistent with the PRA penalty to "'discourage improper denials of access to public records and [encourage] adherence to the goal and procedures directed by the statute.'" Opening Brief of Appellant, at p. 7, §4.6. DOC improperly denied Mr. Entler access to the grievance response by CUS Miller by improperly destroying the grievance, and Mr. Entler asks that the court hold that improper destruction of a record is not an "exemption" from the PRA under Chapter 42.56 RCW.

Mr. Entler respectfully requests that the court find that DOC's improper destruction of the April 2009 grievance response violates the PRA and is not an "exemption," because improper destruction of the public record prohibits DOC from complying with the intent, purposes, and mandates of the PRA.

V. CONCLUSION.

For the reasons stated above, Mr. Entler respectfully requests that the court address the issue left open in Bldg. Indus. Ass'n v. McCarthy, 152 Wn.App. at 741, ¶33, and find that DOC has a duty and obligation to protect a public record from damage under the first paragraph of RCW 42.56.100 to

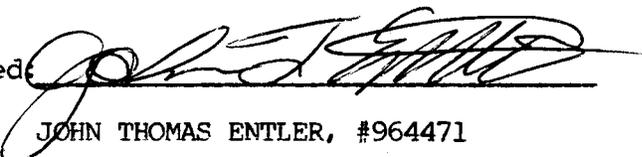
protect the interests of the public to know the conduct of their government, and rule that DOC is required to comply with the Records Retention Act, chapter 40.14 RCW, under the PRA, and reverse the trial courts grant of summary judgement to DOC.

Mr. Entler would also respectfully request that the court public it's opinion in this matter because of the substantial public interests involved, and to aid superior courts in this jurisdiction which will likely address these same issues in the future.

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

Signed this 6th day of January, 2011

Signed:


JOHN THOMAS ENTLER, #964471

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APPENDIX-A

¶11 Reversed and remanded for further proceedings.

VAN DEREN, C.J., and BRIDGEWATER, J., concur.

[No. 38254-7-II. Division Two. October 13, 2009.]

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, *Appellant*, v.
PAT MCCARTHY, as *Pierce County Auditor*, ET AL.,
Respondents.

- [1] **Open Government — Public Disclosure — Public Records — Judicial Review — Appellate Review — De Novo Review.** Agency actions challenged under the Public Records Act (ch. 42.56 RCW) are reviewed by an appellate court de novo.
- [2] **Judgment — Summary Judgment — Review — Scope of Review.** An appellate court reviews a summary judgment by examining whether disputed issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.
- [3] **Judgment — Summary Judgment — Review — Issues Not Raised in Trial Court.** Under RAP 9.12, an appellate court's review of a summary judgment is limited to the record and issues that were before the trial court.
- [4] **Open Government — Public Disclosure — Public Records — Nonexistent Record — In General.** The Public Records Act (ch. 42.56 RCW) does not impose on agencies any duty to create or produce a public record that does not exist.
- [5] **Open Government — Public Disclosure — Public Records — Nonexistent Record — Indiscriminate File Search.** The Public Records Act (ch. 42.56 RCW) does not give citizens the right to indiscriminately sift through an agency's files in search of records that have been demonstrated not to exist.
- [6] **Judgment — Summary Judgment — Review — Role of Appellate Court.** An appellate court reviews a summary judgment by engaging in the same inquiry as the trial court under CR 56(c), viewing the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party.
- [7] **Judgment — Summary Judgment — Issues of Fact — Material Fact — What Constitutes.** For purposes of a summary judgment proceeding, a material fact is one on which the outcome of the action depends.

- [8] **Judgment — Summary Judgment — Burden on Nonmoving Party — Averment of Specific Facts — Prima Facie Case — Elements of Claim.** A defendant moving for a summary judgment bears the initial burden of showing the absence of an issue of material fact. If the defendant meets this burden, the burden shifts to the plaintiff to make a prima facie showing of the essential elements of its case. To meet this burden, the plaintiff cannot rely on allegations in the pleadings or assertions but must present competent evidence by affidavit or otherwise. If the plaintiff fails to make this showing, there is no genuine issue of fact as to the essential element in question and the trial court should grant the defendant's motion for summary judgment. Absent proof of an essential element of the plaintiff's case, all other facts are immaterial.
- [9] **Open Government — Public Disclosure — Denial — Validity — Determination — Summary Judgment — Sufficiency — In General.** A trial court may grant an agency's motion for summary judgment in an action to determine the validity of the agency's denial of a disclosure request under the Public Records Act (ch. 42.56 RCW) if the agency's supporting affidavits provide a sufficient basis to rule in favor of the agency and are unrefuted by the plaintiff. The agency's filing of the motion does not improperly shift the burden of proof to the plaintiff where the affidavits provide sufficient proof of the agency's defense.
- [10] **Government — Records — E-mail — Retention — Attorney General Guidelines — Binding Effect.** Under WAC 44-14-00003, the Attorney General's guidelines for retention of e-mails under WAC 44-14-03005 are not binding on any agency.
- [11] **Open Government — Public Disclosure — Public Records — E-mail — Deletion or Destruction — Validity.** An agency's deleting an interagency e-mail does not violate the Public Records Act (ch. 42.56 RCW) if the act of deletion comports with state guidelines and applicable retention schedules.
- [12] **Judgment — Summary Judgment — Burden on Nonmoving Party — Averment of Specific Facts — Speculation.** Speculation is insufficient to avoid summary judgment.
- [13] **Appeal — Review — Issues First Raised in Motion for Reconsideration — In General.** An appellate court may decline to consider a claim or issue raised for the first time in a motion for reconsideration of the trial court's judgment.
- [14] **Open Government — Public Disclosure — Denial — Validity — Determination — Summary Judgment — Factual Basis — Sufficiency.** A trial court may grant an agency's motion for summary judgment in an action to determine the validity of the agency's denial of a disclosure request under the Public Records Act (ch. 42.56 RCW) if the only factual averments presented in the summary judgment proceeding indicate that the agency produced all re-

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requested records in its possession and that any other records for which a request was made do not exist.

- [15] **Open Government — Public Disclosure — Exemptions — Specification by Agency — Nonexistent Record.** An agency is not required to cite a specific exemption when denying a disclosure request under the Public Records Act (ch. 42.56 RCW) if the denial is based not on an exemption from the disclosure requirement but on the nonexistence of the record sought.
- [16] **Open Government — Public Disclosure — Public Records — Retention Provision — Scope — Applicability.** RCW 42.56.100, which is the sole Public Records Act (ch. 42.56 RCW) provision regulating the destruction of records, applies only to records that are already the subject of a disclosure request. It does not apply to records an agency has not been requested to disclose.
- [17] **Open Government — Public Disclosure — Judicial Review — Show Cause Hearing — Necessity — Nonexistent Record.** The Public Records Act (ch. 42.56 RCW) requires an agency to show cause only when the agency has refused to allow the inspection or copying of a specific public record or class of records. There is no agency action to review under the act where the agency denies a disclosure request because the sought-after public record does not exist.
- [18] **Appeal — Review — Issues Not Supported by Record — In General.** An appellate court may decline to consider a claim or issue that is unsupported by the record.
- [19] **Judgment — Summary Judgment — Continuance — Additional Discovery — Denial — Grounds.** The denial of a CR 56(f) motion for the continuance of a summary judgment proceeding to allow further discovery is appropriate when (1) the requesting party does not provide a good reason for the delay in obtaining the desired evidence, (2) the requesting party does not state what evidence will be established through the additional discovery, or (3) the desired evidence will not raise a genuine issue of material fact.
- [20] **Judgment — Summary Judgment — Continuance — Additional Discovery — Review — Standard of Review.** A trial court's denial of a CR 56(f) motion for the continuance of a summary judgment proceeding to allow further discovery is reviewed for an abuse of discretion. A trial court does not abuse its discretion unless it bases its decision on untenable or unreasonable grounds.
- [21] **Judgment — Summary Judgment — Continuance — Failure To Clearly Request — Effect.** A continuance to allow further discovery in a summary judgment proceeding need not be granted if it is not clearly requested.
- [22] **Judgment — Summary Judgment — Determination — Record — Sufficiency — Additional Discovery — Failure To Request — Effect.** Where a continuance of a summary judgment proceeding to allow further discovery is not clearly requested, the

trial court may properly decide the motion on the basis of the existing record.

- [23] **Appeal — Disposition of Cause — Assignment Rendered Moot.** An appellate court may decline to consider issues rendered moot by its disposition of the case.
- [24] **Motions — Attachments — Motion To Strike — Review — Standard of Review.** A trial court's ruling on a motion to strike an attachment to a motion is reviewed for an abuse of discretion.
- [25] **Appeal — Disposition of Cause — Affirmance on Other Grounds — In General.** An appellate court may affirm a trial court judgment on any basis supported by the record and the law.
- [26] **Motions — Attachments — Motion To Strike — Discretion of Court — Irrelevance to Issues Before the Court.** A trial court may strike an attachment to a motion if the attachment is irrelevant to the issues before the court.
- [27] **Pleading — Supporting Facts — Reasonable Inquiry — Breach of Duty — Sanctions — Review — Standard of Review — In General.** A trial court's ruling on a motion for CR 11 sanctions is reviewed for an abuse of discretion. Discretion is not abused unless no reasonable person would take the view adopted by the trial court.
- [28] **Pleading — Supporting Facts — Reasonable Inquiry — Breach of Duty — Court Rule — Purposes.** The purposes of CR 11 are to deter baseless filings and to curb abuses of the judicial system.
- [29] **Pleading — Supporting Facts — Reasonable Inquiry — Breach of Duty — "Baseless" Filing — What Constitutes.** For purposes of CR 11, a filing is baseless if it is not well grounded in fact or is unwarranted by existing law or a good faith argument for altering existing law.
- [30] **Pleading — Supporting Facts — Reasonable Inquiry — Breach of Duty — Sanctions — Burden of Proof.** A litigant requesting the imposition of CR 11 sanctions against another party or attorney has the burden of justifying the request.
- [31] **Pleading — Supporting Facts — Reasonable Inquiry — Breach of Duty — Sanctions — Meritless Claims.** CR 11 sanctions have a potential chilling effect and should be imposed only when it is patently clear that a claim has absolutely no chance of success. The fact that a complaint does not prevail on its merits is not reason enough, alone, to warrant CR 11 sanctions.
- [32] **Costs — Attorney Fees — Frivolous Claim or Defense — Considered as a Whole.** A prevailing party may be awarded attorney fees under RCW 4.84.185 on the grounds that the action

was frivolous and advanced without reasonable cause only if the action is frivolous as a whole.

- [33] **Appeal — Frivolous Appeal — What Constitutes — In General.** An appeal is frivolous only if no debatable issues are presented upon which reasonable minds might differ and it is so devoid of merit that no reasonable possibility of reversal exists.
- [34] **Costs — Attorney Fees — Frivolous Claim or Defense — Review — Standard of Review.** A trial court's refusal to award attorney fees under RCW 4.84.185 (frivolous claim or defense) is reviewed for an abuse of discretion.
- [35] **Costs — Attorney Fees — Frivolous Claim or Defense — Debatable Issue.** For purposes of a claim for attorney fees under RCW 4.84.185, a claim or defense is not frivolous if it is at least debatable.
- [36] **Trial — Record — Documents — Sealing — Test — Question of Law or Fact — Review — Standard of Review.** The legal standard for sealing or unsealing court records is an issue of law that an appellate court reviews de novo.
- [37] **Trial — Record — Documents — Sealing — Review — Disposition.** A trial court's decision to seal or unseal a document or exhibit in an action or proceeding generally is reviewed for an abuse of discretion, but if the trial court rested its decision on an improper legal rule, the proper remedy is to remand the case to the trial court to apply the correct rule.
- [38] **Trial — Record — Documents — Support of Dispositive Motion — Sealing — Justification — Test.** Documents filed in support of a dispositive motion in a civil case are presumptively open absent some overriding interest.
- [39] **Trial — Record — Documents — Sealing — Test — Elements.** In order to balance the public's constitutional right to the open administration of justice against potentially conflicting rights, a court may not seal a court document unless (1) the proponent of sealing makes some showing of need; (2) anyone present when the motion to seal is made is given an opportunity to object to the motion; (3) the court, the proponents, and the objectors analyze whether sealing the records is the least restrictive means available and would be effective in protecting the interests threatened; (4) the court weighs the competing interests of the parties and the public; and (5) the order to seal is no broader in its application or duration than necessary to serve its purpose.
- [40] **Trial — Record — Documents — Support of Dispositive Motion — Sealing — Justification — Innocuous But Embarrassing Document.** A court is not justified in sealing an innocuous but embarrassing document filed in support of a dispositive motion

in a civil case merely because of the embarrassing nature of the document.

- [41] **Appeal — Review — Issues Raised by Amici Curiae — In General.** An appellate court may decline to consider an issue raised solely in an amicus curiae brief.
- [42] **Open Government — Public Disclosure — Public Records — Attorney Fees — Prevailing Party — Necessity.** RCW 42.56.550(4) provides authority to award attorney fees in actions under the Public Records Act (ch. 42.56 RCW) only to prevailing parties.
- [43] **Pleading — Supporting Facts — Reasonable Inquiry — Breach of Duty — Court Rule — Scope — Appellate Proceedings.** There is no current authority for awarding CR 11 sanctions on appeal.
- [44] **Costs — Attorney Fees — American Rule.** Washington follows the American rule concerning attorney fees, under which fees attorney fees and litigation expenses are recoverable in an action only if authorized by statute, contract, or a recognized ground in equity.

Nature of Action: A building industry association sought relief on claims that a county auditor and the county violated the Public Records Act by failing to provide requested voter registration records and that they violated the Public Records Act and the preservation and destruction of Public Records Act by failing to retain certain e-mails under statutory retention schedules. The defendants counterclaimed that the plaintiff's action was frivolous.

Superior Court: The Superior Court for Thurston County, No. 07-2-01058-8, Anne Hirsch, J., on December 14, 2007, dismissed the claims against the auditor, entered a summary judgment in favor of the county on the plaintiff's claims, denied summary judgment to the county on its counterclaim, declined to award sanctions to either party, struck an inadvertently disclosed attorney/client e-mail communication that was attached to a discovery document filed by the county, and declined to seal the attorney/client e-mail communication.

Court of Appeals: Holding that the trial court properly granted summary judgment to the county on the plaintiff's

Public Records Act claim, did not abuse its discretion by striking the attorney/client e-mail communication or by denying the parties' claims for sanctions, and did not err by denying the county's motion to seal the attorney/client e-mail communication; that neither party is entitled to an award of attorney fees on appeal; and that the plaintiff's request to substitute a party is moot, the court *affirms* the trial court's judgments and orders, *denies* the plaintiff's motion to substitute a party, *denies* each party's motion to strike the other's statement of additional grounds, and *denies* both parties' requests for attorney fees on appeal.

Greg Overstreet and Michele L. Earl-Hubbard (of Allied Law Group, LLC) and Andrew C. Cook (of Hamilton Consulting Group), for appellant.

Daniel R. Hamilton, for respondents.

Katherine George on behalf of Washington State Association of Broadcasters, Washington Newspaper Publishers Association, and Allied Daily Newspapers of Washington, amici curiae.

LexisNexis® Research References

Washington Administrative Law Practice Manual
Washington Rules of Court Annotated (LexisNexis ed.)
Annotated Revised Code of Washington by LexisNexis

¶1 *PENNOYAR, A.C.J.* — The Building Industry Association of Washington (BIAW) appeals the summary judgment dismissal of its suit against Pierce County (County), alleging that the County violated the Public Records Act (PRA), chapter 42.56 RCW. BIAW contends that the trial court erred by (1) granting the County's summary judgment motion, (2) dismissing the county auditor as a defendant, (3) striking an inadvertently disclosed e-mail communication from defense counsel to his client, and (4) denying BIAW's motion for CR 11 sanctions. The County cross-

appeals the trial court's dismissal of its cross-claim. The County contends that the trial court erred by (1) denying its cross-claim for sanctions for BIAW's frivolous suit and (2) denying its motion to seal the inadvertently disclosed attorney/client e-mail communication. We affirm the trial court.

FACTS

¶2 On October 12, 2006, Pierce County Auditor Pat McCarthy and her election manager Lori Augino reported by telephone to State Assistant Elections Director Pam Floyd that they had observed problems with voter registration forms submitted by a political group identified as the Association of Community Organizations for Reform Now (ACORN). Having heard similar concerns from two other counties, Floyd sent a "global informational email" announcement to all county auditors informing them of these reports. Clerk's Papers (CP) at 1161. Floyd later explained she had done so "to inform those who had not yet reported such concerns of this issue and to solicit from them information if similar issues had risen in those offices." CP at 1162. Based on information her office had received from Pierce and other reporting counties, Floyd later that day sent a second global e-mail bulletin to every auditor describing how they too could identify ACORN registrations.

¶3 Though Pierce County's auditor already was aware of the issue because she had reported it, copies of the e-mails were sent to her because it was "easier to send a global email to all auditors." CP at 1162. In compliance with applicable retention policies, McCarthy read these informational e-mails and "more probably than not" deleted them the same month she received them. CP at 64-65.

¶4 Over five months later, on March 23, 2007, McCarthy received a public records request from BIAW seeking "all records relating to or referencing . . . ACORN registration cards submitted to your office" and "all records relating to the cases referred to the prosecutor" from "this batch of

registration cards.” CP at 28. Within five days the auditor had identified 615 responsive documents and informed BIAW that they were available for inspection, copying, or mailing.¹ On April 18, 2007, however, BIAW wrote claiming it had “proof that Pierce County is withholding documents responsive to the original public records request” because the hundreds of documents the auditor previously provided included neither the global informational “email from the Washington Secretary of State’s office to Pat McCarthy” that BIAW had obtained prior to making its PRA request, nor any documentation of a telephone call county election official “Lori” supposedly had concerning “ACORN registration cards with King County elections staff.” CP at 34. BIAW threatened that if McCarthy’s office “fails to provide the documents requested, BIAW will sue Pierce County to obtain the requested records.” CP at 34.

¶5 Within a week McCarthy replied that despite a further exhaustive search, neither she nor her staff had discovered the e-mail mentioned because her office did not keep the same e-mails as the secretary of state’s office and that any alleged telephone conversation with King County had not been documented because the auditor’s office does not generate records of every meeting and conversation. She also explained that both the staff and working space for the Pierce County Auditor’s Office is small, which allows most communications between the auditor and her staff to be “face to face” so that they “do not generate large numbers of emails unless [someone] is out of the office.” CP at 60. This second search, however, did reveal that one additional responsive e-mail in the office’s electronic in-box had been overlooked as well as had all those in the auditor’s sent boxes of e-mail (because the sent boxes mistakenly had not been checked previously) and therefore 38 pages of additional e-mails were immediately provided to BIAW.

¶6 On May 2, 2007, BIAW again wrote asserting that the County had “failed to provide all of the public records it

requested,” describing it as “astonishing” that the auditor’s office did not keep duplicates of secretary of state e-mail bulletins and arguing “your office surely had in its possession e-mails and other public records pertaining to the ACORN voter registration forms prior to February, 2007” because “Pierce County knew there were problems with the ACORN registration forms prior to February, 2007.” CP at 42. BIAW again threatened suit if the auditor’s office did not produce the requested records and warned that “[u]nlawful destruction of such records can be a crime.” CP at 43. The auditor referred the matter to the Pierce County Prosecutor’s Office, which confirmed to BIAW in a letter and a telephone conversation that the auditor’s office had previously provided BIAW all records related to or referencing voter registration cards submitted by ACORN, other than original voter registration records protected by RCW 29A.08.710, and that the e-mails from the Washington Secretary of State’s Office were not retained because they do not fall within the retention schedules set for local governments.

¶7 On May 25, 2007, BIAW filed a “Complaint For Violations of Public Records Act, RCW 42.56 and RCW 40.14,” naming as defendants McCarthy “in her official capacity as Pierce County Auditor” and Pierce County. CP at 6. The complaint alleged that McCarthy and the County “violated RCW 42.56.550 by failing to provide all public records requested by BIAW” or “violated the Public Records Act and the Preservation and Destruction of Public Records Act, RCW 40.14 *et seq.*, by failing to retain emails under the retention schedules set forth . . . under the act.” CP at 10.

¶8 In their answer, defendants denied these claims and asserted a counterclaim under RCW 4.84.185 contending that BIAW’s suit was frivolous. BIAW conducted no discovery during the ensuing 4 months of litigation.

¶9 On June 21, 2007, McCarthy and the County moved for summary judgment based on sworn declarations from the auditor, her election manager, the records management coordinator, and a county computer expert, which con-

¹ The 615 records were produced after a search of the auditor’s e-mail, electronic files, and hard copy files.

firmed that (1) repeated searches revealed no requested document had been withheld from BIAW, (2) the only records not retained were the two informational e-mails from the secretary of state that had been disposed of pursuant to the state approved destruction authorization, and (3) no other undisclosed responsive e-mails would have existed because the small auditor's office does not often use electronic messages for internal communication. BIAW did not offer evidence disputing this testimony or seek a continuance under CR 56(f) to facilitate discovery of some opposing evidence; it instead asserted that defendants' unrefuted evidence was "extremely unlikely" and that it raised a fact question about whether the County had failed to properly retain and disclose records responsive to BIAW's request. CP at 92. BIAW contended that the County's affidavits provided "grounds for discovery." CP at 93. Without seeking a continuance to conduct discovery,² BIAW's brief opposing summary judgment asked the court to dismiss the County's summary judgment motion and "instead . . . compel Pierce County to show any cause why it hasn't violated the PRA." CP at 103.

¶10 On July 20, 2007, the trial court ruled there was no "action in this case under [chapter] 42.56 [RCW]" for withholding documents. Report of Proceedings (RP) (July 20, 2007) at 27. The court explained that

the only facts in the record are from Pierce County, their sworn declarations from the [C]ounty auditor and certain of her staff, including somebody from the [information technology] department And I don't think there's any showing that Pierce County has these documents in their possession, that they have not disclosed. . . . There's no showing that they existed and I'm going to grant summary judgment on that respect.

RP (July 20, 2007) at 27-28. The court dismissed the auditor as a separate defendant, granted summary judgment to the County "as to RCW 42.56," and further ruled that "any claim under RCW 40.14 et seq." against the County for

² BIAW's brief opposing summary judgment did not mention CR 56(f).

deletion of records was "continued for further briefing." CP at 198.

¶11 On July 30, 2007, BIAW moved for reconsideration of its dismissed PRA claim. Recognizing BIAW still had made "no showing that Pierce County improperly deleted or destroyed any record in violation of the Act, despite the plaintiff's attempt to characterize the record in that way," the trial court on September 7, 2007, denied reconsideration and dismissed all of BIAW's claims. RP (Sept. 7, 2007) at 35.

¶12 On October 5, 2007, defendants moved for summary judgment on their counterclaim. In response, BIAW filed a CR 11 motion for sanctions calling defendants' counterclaim "a false legal position" that was "not normal" and "very odd behavior," and describing defense counsel as "emotionally invested," "out-of-control," "over the top," and a "very angry lawyer who has lost his professional judgment" and "lost control of himself." CP at 963-64, 966 n.1, 969, 973-74. Accompanying its motion, BIAW filed an e-mail communication (dated September 7, 2007) between defense counsel and the auditor that BIAW had obtained as part of a later PRA request to the auditor's office.³ This inadvertently disclosed attorney/client communication reported to clients and superiors on courtroom events and future litigation matters. The County moved to strike the September 7 e-mail, arguing that it was irrelevant, a privileged communication, and attorney work product.⁴

¶13 On November 9, 2007, the trial court heard argument regarding the parties' motions to strike, the summary judgment motion on the County's counterclaim, and BIAW's

³ BIAW submitted a new PRA request to the auditor's office on September 25, 2007, seeking all documents regarding the auditor's business trips since January 1, 2007, and all documents referencing voter registration cards submitted by ACORN from April 18, 2007, until receipt of the request letter. The September 7, 2007, e-mail in question was inadvertently provided as part of that request.

⁴ Both sides submitted motions to strike various documents (e.g., newspaper articles, declarations, etc.) submitted by the parties relevant to the County's counterclaim and BIAW's opposition to same. The trial court's rulings on those matters are not challenged other than as described above.

CR 11 motion. The trial court ordered the September 7 e-mail stricken as attorney work product and privileged.⁵ As to the County's counterclaim, the court ruled that although BIAW lost its suit, its claim was not frivolous, and thus the court declined to award the County any fees or costs under RCW 4.84.185. The court also declined to award either party CR 11 sanctions.⁶ The trial court observed that while open, vigorous, and free debate was to be supported, personal attacks were inappropriate. The trial court commented (but declined to find) that both counsel had "unclean hands" in this regard, and it chided counsel to "work on the issues and not on the personalities." RP (Nov. 9, 2007) at 30.

¶14 On or about December 7, 2007, the County filed a motion to seal and return the previously stricken September 7 attorney/client e-mail communication. On December 14, 2007, the trial court heard argument on the motion to seal, took that matter under advisement, and later issued a letter ruling denying the motion.⁷ In the letter ruling, the court determined that the September 7 e-mail was "at best, innocuous and at worst, embarrassing" and thus did not warrant sealing. CP at 1066.

¶15 On January 11, 2008, BIAW filed a notice of appeal, and on January 15, 2008, defendants cross-appealed. BIAW sought direct review, but our Supreme Court transferred the case to us. We subsequently granted a motion to file an amicus brief that was submitted by several media con-

⁵ At the September 7, 2007, hearing the trial judge had disclosed her spouse's previous employment by plaintiff's new counsel, prompting the attorney/client e-mail that informed defendants of that courtroom disclosure and confirmed the intent to proceed with the County's counterclaim for fees and sanctions.

⁶ Overlooking CR 54(e), neither party obtained a timely order reflecting dismissal of BIAW's CR 11 claim. That omission was rectified by the trial court's subsequent March 14, 2008, order denying BIAW's motion for CR 11 sanctions, which was entered with the Supreme Court's permission following BIAW's filing of its petition for direct review.

⁷ At the December 14 hearing, the trial court also ruled that the County was the prevailing party in the overall suit, even though it had lost its counterclaim. The court issued a final order awarding the County \$200 in statutory costs as the prevailing party.

cerns.⁸ Less than a week before oral argument, BIAW filed a statement of additional authority and a motion to substitute Jan Shabro, who was McCarthy's successor. The County opposed the substitution and moved to strike BIAW's statement of additional authority. BIAW responded to the County's motion with its own contingent motion to strike the County's previously filed statement of additional authorities in the event we granted the County's motion to strike. All motions filed in this time period were passed to the merits. We now consider BIAW's appeal and the County's cross-appeal.

ANALYSIS

I. SUMMARY JUDGMENT ON BIAW'S PRA CLAIM

¶16 BIAW contends that the trial court erred in granting the County summary judgment on BIAW's PRA claim. We disagree.

¶17 The County concedes that two e-mails sent from the secretary of state's office were not retained and were permanently deleted. BIAW claims that failure to retain these e-mails was unlawful and offers various theories to support the idea that other e-mails have been destroyed or are not being disclosed.

A. Review in Public Record Act Cases

[1-3] ¶18 We review all agency actions challenged under the public records act de novo. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Because this case was decided on summary judgment, we examine whether disputed issues of material fact exist and whether the County was entitled to judgment as a matter of law. *Smith v. Okanogan County*, 100 Wn. App. 7, 11, 994 P.2d 857 (2000). Our review is limited, however,

⁸ Amici include Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, Washington State Association of Broadcasters, and Society of Environmental Journalists. These amici had previously filed a brief supporting BIAW's petition for direct review.

to the evidence and issues presented to the trial court. RAP 9.12; *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017 (2009).

¶19 The purpose of the act is to provide “full access to information concerning the conduct of government on every level . . . as a fundamental and necessary precondition to the sound governance of a free society.” RCW 42.17.010(11). The public records portion of the act, RCW 42.56.001-.902, requires all state and local agencies to disclose any public record upon request, unless it falls within certain specific enumerated exemptions. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136, 96 P.3d 1012 (2004); *King County v. Sheehan*, 114 Wn. App. 325, 335, 57 P.3d 307 (2002); RCW 42.56.070(1). The requested record must be made available “for public inspection and copying.” RCW 42.56.070(1). The Pierce County Auditor’s Office is an “agency” subject to the act’s provisions. RCW 42.56.010(1); RCW 42.17.020(2); *see also* former RCW 42.56.010 (2005) (referencing RCW 42.17.020) (LAWS OF 2005, ch. 274, § 101); former RCW 42.17.020(2) (2005) (defining “agency” to include any county office (LAWS OF 2005, ch. 445, § 6)).

[4, 5] ¶20 Public records subject to inspection under the act include (1) any writings (2) that contain information related to the “conduct of government or the performance of any governmental or proprietary function” and (3) that are “prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(2); RCW 42.17.020(42). However, an agency has “no duty to create or produce a record that is nonexistent.” *Sperr*, 123 Wn. App. at 136-37 (citing *Smith*, 100 Wn. App. at 13-14). Moreover, just 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,’” *Sperr*, 123 Wn. App. at 137 (quoting *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604 n.3, 963 P.2d 869 (1998)), the act “does not authorize indiscriminate sifting through an agency’s files by citizens searching for records that have been demon-

strated not to exist.” *Sperr*, 123 Wn. App. at 137 (emphasis added).

B. Review of Summary Judgment Orders

[6-8] ¶21 When reviewing an order of summary judgment, we perform the same inquiry as the trial court. *Ames v. City of Fircrest*, 71 Wn. App. 284, 289, 857 P.2d 1083 (1993) (citing *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992)). We consider the facts and reasonable inferences in the light most favorable to the nonmoving party. *Ames*, 71 Wn. App. at 289. “The moving party is entitled to summary judgment only if the submissions to the court ‘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.’” *Ames*, 71 Wn. App. at 289 (quoting CR 56(c)). A material fact is a fact upon which the outcome of the action depends. *Ames*, 71 Wn. App. at 289. The moving party bears the initial burden of showing the absence of an issue of material fact. *Ames*, 71 Wn. App. at 289-90 (quoting *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). If a defendant movant meets this burden, the plaintiff must respond by making a prima facie showing of the essential elements of its case. *Ames*, 71 Wn. App. at 290; *Young*, 112 Wn.2d at 225-26. The plaintiff cannot rely on allegations in the pleadings or assertions, but must present competent evidence by affidavit or otherwise. *Ames*, 71 Wn. App. at 290 (citing *Young*, 112 Wn.2d at 225-27). If the plaintiff fails to make such a showing, there is no genuine issue of fact as to the essential element in question and the trial court should grant the defendant’s motion for summary judgment. *Ames*, 71 Wn. App. at 290; *Young*, 112 Wn.2d at 225. Absent proof of an essential element of the plaintiff’s case, all other facts are immaterial. *Ames*, 71 Wn. App. at 290; *Young*, 112 Wn.2d at 225.

[9] ¶22 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. *See Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005) (summary judgment is an appropriate procedure in public disclosure act cases, and trial court may conduct a hearing based solely on affidavits or in camera review of documents).

¶23 BIAW contends that the presence of several material fact questions concerning whether and how the auditor's office uses e-mails render summary judgment improper. However, the County's affidavits answer those questions (i.e., they describe office practices, when and how e-mails 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." RP (July 20, 2007) at 26-27; *see Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (where summary judgment movant has met its initial burden, in order to avoid summary judgment nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists). Because BIAW did not do so, summary judgment was proper.

C. Proof the Records Were Unlawfully Destroyed

[10, 11] ¶24 Throughout its brief, BIAW characterizes the destruction of e-mails in this case as unlawful. But there is simply no evidence in the record of any unlawful destruction of e-mails. BIAW cites attorney general guidelines that agencies should not delete "all e-mails after a short period of time (such as thirty days)." Br. of Appellant at 17 (citing WAC 44-14-03005). However, those guidelines

do not "bind any agency," WAC 44-14-00003; the auditor did not delete all e-mails; BIAW's request came almost one-half year—not 30 days—after the only e-mails identified had been received, and the two e-mails actually deleted here were done so lawfully pursuant to state guidelines and applicable retention schedules. *See RCW 40.14.060-.070*.

¶25 Pam Floyd, the assistant elections director who sent the e-mails from the secretary of state's office, declared that she neither intended these bulletins to reflect a transaction of business between the agencies nor that they be "retained by county auditors as evidence of such." CP at 1162. In this context, when the County received copies of these two global e-mails, the e-mails likely would have been read and deleted as the secretary of state's own guidelines and state approved destruction authorizations recommend. RCW 40.14.060-.070 (destruction of public records authorized when pursuant to state approved schedule). If no special request was made, the e-mails then would have been kept on computer backup until later overwritten after a set retention period.

¶26 These procedures comport with applicable retention policies. *See CP at 479, 511* (secretary of state's "Records Management Guidelines" provide that when documents are "transmitted to multiple recipients . . . [e]ach recipient need not retain the document beyond his or her immediate need for the information it contains" because "responsibility for retaining and disposing of these documents as public records logically rests with the office from which it was issued" and "[p]rompt deletion of duplicate copies of e-mail messages . . . makes the system much easier to manage and reduces disk space consumed by redundant information." (emphasis omitted)); *see also CP at 509* (because "content and not the medium determine the treatment of the message," the "types of messages sent by e-mail that typically have no retention value" include "information-only copies . . . distributed for convenience of reference" and "copies of inter- or intra-agency memoranda, bulletins or directions of a general information and non-continuing nature" (capitalization

omitted) (emphasis omitted)). State approved “Public Records Retention Schedule [and] Destruction Authorization” criteria provide likewise. See CP at 1159 (“E-Mail messages that are not public records” include “information only copies . . . distributed for reference or convenience, such as announcements or bulletins” and may be “[d]elete[d] . . . immediately upon review.”); CP at 290, 295 (“general records retention schedule” noting “E-Mail messages which are usually administrative materials with no retention value” include “information-only copies” (capitalization omitted)); CP 576-77 (“County Auditor’s General Records Retention Schedule” lists as “having no public record retention value and may be disposed of as soon as they have served their purpose: . . . informational copies” of materials such as “correspondence . . . prepared for reference and informational distribution.” (capitalization omitted)).⁹

[12, 13] ¶27 BIAW also contends that because the auditor’s office appears to destroy e-mails, such destruction *might* violate the federal Voting Rights Act of 1965, 42 U.S.C. § 1974. This mere allegation is speculative and insufficient to avoid summary judgment. In any event, BIAW first mentioned the federal provision in its motion for reconsideration. For that reason alone, we need not consider it. See *Wesche v. Martin*, 64 Wn. App. 1, 6-7, 822 P.2d 812 (1992) (issues first raised in motion for reconsideration need not be considered on appeal).

D. Proof that the Records Have Not Been Disclosed

[14] ¶28 Here, the only evidence presented at the summary judgment hearing indicated that the auditor’s office

⁹ We note that in its motion for reconsideration, BIAW argued to the trial court that the correct retention guidelines were those attached to state archivist, Jerry Handfield’s, declaration rather than the guidelines that the County provided. In rendering its decision on BIAW’s motion for reconsideration and clarifying its earlier ruling, the trial court correctly noted that both retention policies provided that informational copies qualified as administrative materials with no retention value and, thus, could be disposed of as soon as they had served their purpose. See RP (Sept. 7, 2007) at 40-41; CP at 184, 295 (guidelines designating e-mail messages that are informational copies as administrative materials with no retention value).

had provided all the records that it had concerning BIAW’s request. *Sperr* addresses this circumstance. Division Three of this court affirmed summary dismissal of the requestor’s PRA suit, which alleged that he was denied his right to inspect or copy his police file. *Sperr*, 123 Wn. App. at 135. In response to a records request, the manager of the city’s police records unit sent the requestor every file that included the requestor’s name and the results of all computer searches for his name on various databases. Although the computer databases contained no additional references to the requestor, he sought access to the police department’s computer files so he could search for any information regarding his alleged criminal activity. *Sperr*, 123 Wn. App. at 133-34, 137.

¶29 Division Three held that the city did not deny the requestor an opportunity to inspect or copy a public record because the public record he sought “did not exist” and, consequently, there was no agency action to review under the act. *Sperr*, 123 Wn. App. at 137. Accordingly, *Sperr* held that the trial court did not err in granting summary judgment dismissal of the requestor’s PRA suit. *Sperr*, 123 Wn. App. at 137 (citing *Smith*, 100 Wn. App. at 11). The same is true here.

¶30 *Sperr* answers BIAW’s similar contention that it should be permitted to have a forensic computer expert comb the auditor’s computers for any further e-mails regarding ACORN. That contention is contrary to *Sperr* because the only evidence presented at the summary judgment hearing indicated that any other e-mails referencing ACORN do not exist. See *Sperr*, 123 Wn. App. at 137.

[15] ¶31 BIAW alternatively relies on *Prison Legal News, Inc., v. Department of Corrections*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005), and *Progressive Animal Welfare Society*, 125 Wn.2d at 250, for the general proposition that records should be disclosed unless they fall within an exception. However, neither of these cases concerns records that did not exist at the time of a request. Moreover, the PRA’s requirement that an agency provide a specific exemp-

tion when *denying* a request for public documents applies to “the situation where the agency has the records but says, ‘we are not going to give them to you’ [rather than where the agency says] ‘we do not have these records.’” *Daines v. Spokane County*, 111 Wn. App. 342, 348, 44 P.3d 909 (2002); *see also Smith*, 100 Wn. App. at 13-14 (agency has no duty to create a record in response to a request; only existing records must be provided).

[16, 17] ¶32 Notably, the only PRA provision that actually regulates destruction of records provides, “If a public record request is made *at a time when such record exists* but is scheduled for destruction in the near future, the agency . . . may not destroy or erase the record until the request is resolved.” RCW 42.56.100 (emphasis added). That provision was not triggered under the facts of this case.¹⁰ The same is true for the PRA’s show cause provision. RCW 42.56.550(1) authorizes only those “having been denied an opportunity to inspect or copy a public record by an agency” to “require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.” Accordingly, there is “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.” *Sperr*, 123 Wn. App. at 137; *see also Kleven v. City of Des Moines*, 111 Wn. App. 284, 294, 44 P.3d 887 (2002) (no violation of the public disclosure act because the

¹⁰ *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989), on which BIAW relies, does not require a different result. There, the request for public records was made repeatedly over nearly a one year period. *Yacobellis*, 55 Wn. App. at 708. At the end of that period, the agency informed the requester that the records had been discarded. The *Yacobellis* court noted that it was “unknown” when the records were actually discarded. 55 Wn. App. at 708. Nevertheless, the court noted that when the requester first asked for the questionnaires at issue, the city “refused to provide copies of the completed questionnaires on the ground that all complete data was in the survey,” which the city did provide. *Yacobellis*, 55 Wn. App. at 708. Notably, the stated reason for the city’s refusal to give the requester the documents when he first asked for them was not because the city did not have the documents. Thus, *Yacobellis* does not appear to be a case where destruction of documents occurred *before* a request was made. Accordingly, the facts of *Yacobellis* fall within the prohibitions of RCW 42.56.100 as discussed above. However, that is not the circumstance presented in this case.

agency had “made available all that it could find”); *Smith*, 100 Wn. App. at 22 (when county had nothing to disclose, its failure to do so was proper); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004) (public disclosure act requires agencies to produce only identifiable public records).

E. Interplay of the Public Records Act and the Records Retention Act

[18] ¶33 BIAW argues that unless the courts require public agencies to comply with the records retention act, chapter 40.14 RCW, agencies may easily circumvent the PRA, chapter 42.56 RCW, by improperly destroying records. While the logic of this argument is compelling, no improper destruction of record under the records retention act has been shown here so we are presented with no opportunity to determine if the law supports that logic.

¶34 We observe that BIAW’s argument evolved substantially between the summary judgment hearing and the hearing on its motion for reconsideration. At summary judgment, BIAW contended that the County violated the PRA by failing to produce the two e-mails sent from the secretary of state’s office, and that the prior destruction of these e-mails was unlawful (i.e., violated retention schedules). The trial court granted the County’s summary judgment motion dismissing BIAW’s PRA claim, but it ordered more briefing on the alleged violation of the retention act, chapter 40.14 RCW, including whether BIAW had standing to pursue any alleged violation of the retention act.

¶35 BIAW moved for reconsideration (with new counsel) and the County filed a renewed motion for summary judgment. At the ensuing hearing on both motions, BIAW’s new counsel argued that the two e-mails sent from the secretary of state’s office were not themselves material (BIAW’s counsel stated he would not bring a PRA claim for documents that his client already had), but the existence of the two e-mails suggested that “[t]here might be more [e-mails].” RP (Sept. 7, 2007) at 10. The parties also agreed

that there was no private right of action under chapter 40.14 RCW. The trial court noted such agreement and found that the two e-mails in question were informational copies under the retention schedules provided by either party and thus they were not unlawfully deleted and were not subject to required disclosure under the PRA. There was also no evidence that the County had deleted other e-mails as BIAW alleged. The court denied reconsideration and dismissed BIAW's suit.

¶36 Notably, the trial court did not reach whether violation of the retention act could form a basis for a PRA violation because the court concluded that the two e-mails at issue had been properly deleted. Although BIAW attempted on reconsideration to broaden or recharacterize the issue before the court as whether an agency could avoid a PRA violation by unlawfully deleting e-mails, the trial court did not reach that issue under the facts presented.

¶37 On appeal, BIAW again argues that unlawful destruction of records (i.e., noncompliance with the retention act) should be a violation of the PRA. This record provides no basis for such argument.

F. Discovery and Continuance Issues

¶38 BIAW next contends that it argued to the trial court that it should be able to conduct discovery, but that no discovery was allowed. However, the record shows that in the four months of litigation preceding the dismissal of its claim, BIAW never made a single discovery request, never moved under CR 56(f) for a continuance in order to conduct any discovery, and never made the showing required to delay summary judgment for purposes of discovery.

[19, 20] ¶39 A trial court may continue a summary judgment hearing if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery. CR 56(f); *Winston v. Dep't of Corr.*, 130 Wn. App. 61, 64-65, 121 P.3d 1201 (2005). "The trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the

delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003) (citing *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111, 845 P.2d 1325 (1992)). We review a trial court's decision on a request to continue the summary judgment for abuse of discretion. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001). A trial court abuses its discretion if it bases its decision on untenable or unreasonable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[21, 22] ¶40 As noted, BIAW did not move for a continuance. Where a continuance is not clearly requested, the trial court does not err in deciding a summary judgment motion based on the evidence before it. *See Colwell*, 104 Wn. App. at 615; *Turner v. Kohler*, 54 Wn. App. 688, 695, 775 P.2d 474 (1989) (trial court acted properly in hearing the motion on the basis of the showing before it); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 24-25, 851 P.2d 689 (1993) (if plaintiff "needed additional time, the proper remedy would have been to request another continuance from the trial court" and "[b]ecause she failed to do this, . . . she is precluded from raising this issue on appeal" since to "hold otherwise would constitute an unwarranted encroachment on the trial court's discretion to dismiss cases which fail to raise genuine issues for trial"). In light of BIAW's failure to clearly move for a continuance, we hold that the trial court did not err in deciding the County's summary judgment motion based on the evidence before the court.

II. DISMISSAL OF AUDITOR; MOTION TO SUBSTITUTE PARTIES

[23] ¶41 BIAW contends that the trial court erred in dismissing McCarthy as a named defendant and asks us to address the fact that a new auditor has been sworn in. As we affirm dismissal, we need not address these issues. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 165-66, 795 P.2d 1143 (1990) (reviewing court need not decide all issues the parties raise but only those that are determinative).

III. MOTION TO STRIKE

[24] ¶42 BIAW contends that the trial court erred in granting the County's motion to strike the September 7, 2007, e-mail attached to BIAW's CR 11 motion, which BIAW had filed in response to the County's counterclaim. We review the trial court's determination for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999) (trial court's evidentiary rulings are reviewed for abuse of discretion).

[25, 26] ¶43 As noted, the trial court granted the motion to strike, ruling that the attorney/client e-mail communication was work product or privileged. BIAW argues that the e-mail was neither privileged nor work product. Even if that is so, the trial court did not abuse its discretion in striking the e-mail because the e-mail was simply not relevant. We may affirm a trial court on any basis the record and the law support. *State v. Kelley*, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992). Here, the tone of the e-mail may have been embarrassing for the prosecutor, but the information that it contained was already known to both parties. The e-mail reported that the County had prevailed at the hearing held earlier that day, it described a disclosure the trial judge made in open court, and it noted that the County's counterclaim for sanctions was still pending. All of these matters were public record. It was irrelevant to BIAW's CR 11 claim (despite BIAW's contentions otherwise) and had no value except for the possible embarrassment that the tone of some comments might cause defense counsel. As the trial court later noted, the e-mail was "at best, innocuous and at worst, embarrassing." CP at 1066. Accordingly, we hold that the trial court did not abuse its discretion in striking the irrelevant September 7, 2007, e-mail.

IV. SANCTIONS

¶44 As noted, in response to BIAW's suit, the County filed a counterclaim seeking fees and sanctions under RCW 4.84.185 and CR 11. BIAW responded by filing a motion for CR 11 sanctions. The trial court denied both parties' claims noting that the case presented at least some debatable issues and that the court was troubled by the level of discourse and the conduct of counsel for both sides. Both parties challenge the denial of their claims for sanctions.

[27] ¶45 We review a trial court's decision to impose or deny CR 11 sanctions under the abuse of discretion standard. *Brin v. Stutzman*, 89 Wn. App. 809, 827, 951 P.2d 291 (1998). An abuse of discretion occurs only when no reasonable person would take the view that the trial court adopted. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

[28-31] ¶46 The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004) (citing *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)). A filing is baseless if it is not well grounded in fact or not warranted by existing law or a good faith argument for altering existing law. *Skimming*, 119 Wn. App. at 754. "The burden is on the movant to justify the request for sanctions." *Biggs*, 124 Wn.2d at 202. Because CR 11 sanctions have a potential chilling effect, the trial court should impose sanctions "only when it is patently clear that a claim has absolutely no chance of success." *Skimming*, 119 Wn. App. at 755 (citing *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999)). The fact that a complaint does not prevail on its merits is not enough. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

[32-34] ¶47 Similarly, RCW 4.84.185 authorizes the trial court to award the prevailing party reasonable expenses, including attorney fees, incurred in opposing a frivolous action. *Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wn. App. 500, 510, 31 P.3d 698 (2001). Such an award is available

only when the action as a whole can be deemed frivolous. *Koch*, 108 Wn. App. at 510. "An appeal is frivolous only 'if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.'" *Goad v. Hambridge*, 85 Wn. App. 98, 105, 931 P.2d 200 (1997) (quoting *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985)). We review a trial court's award under RCW 4.84.185 for an abuse of discretion. *Koch*, 108 Wn. App. at 510.

[35] ¶48 Here, the trial court asked for additional briefing regarding the interplay between chapter 40.14 RCW and chapter 42.56 RCW, and also permitted additional oral argument when addressing the motion for reconsideration. This alone indicates that—at least in the trial court's mind—the case before it was not frivolous. Moreover, the County's contention that BIAW clearly had no legal basis for including McCarthy as a defendant was at least debatable given that PRA suits have been brought against other state officers in their official capacity. *See, e.g., Evergreen Freedom Found. v. Locke*, 127 Wn. App. 243, 110 P.3d 858 (2005). Also, the trial court rejected the County's initial contention that the two e-mails sent from the secretary of state's office were not public records because the County did not prepare, own, or use the e-mails. Although the court ultimately concluded that these two e-mails were informational copies only, and thus not subject to disclosure under the PRA, the record demonstrates that the County did not prevail on every issue. In light of these circumstances and the trial court's justified displeasure with the conduct of both counsel, we hold that the trial court did not abuse its discretion in denying the parties' claims for sanctions.¹¹

¹¹ Additionally, BIAW's opening brief refers us to its trial brief for argument supporting its CR 11 motion. This is improper and a sufficient basis for us to disregard the issue. Issues relying on incorporated trial court briefing are considered abandoned. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998); *McNeil v. Powers*, 123 Wn. App. 577, 591, 97 P.3d 760 (2004).

V. MOTION TO SEAL

¶49 The County contends that the trial court erred in denying its motion to seal and return the inadvertently disclosed September 7, 2007, attorney/client e-mail communication. We disagree.

¶50 The County filed the motion to seal some six weeks after the e-mail appeared in the court file as an attachment to a BIAW filing. The trial court heard oral argument on the matter on December 14, 2007, and denied the motion in a subsequent letter ruling.

[36, 37] ¶51 The legal standard for sealing or unsealing court records is a question of law we review de novo. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005). We review a trial court's decision to seal or unseal records for abuse of discretion, but if that decision is based on an improper legal rule, we will remand the case to the trial court to apply the correct rule. *Rufer*, 154 Wn.2d at 540.

[38, 39] ¶52 Trial proceedings and records attached to dispositive motions filed in civil cases are presumptively open absent some overriding interest. *Rufer*, 154 Wn.2d at 541-42; *Dreiling v. Jain*, 151 Wn.2d 900, 910, 93 P.3d 861 (2004). When addressing requests to seal court documents, in order to balance the public's constitutional right to open administration of justice against potentially conflicting rights, courts are required to apply the five factors noted in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982); *Rufer*, 154 Wn.2d at 544. Those factors are (1) the proponent of closure and/or sealing must make some showing of the need therefor; (2) anyone present when the closure and/or sealing motion is made must be given an opportunity to object to the suggested restriction; (3) the court, the proponents, and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened; (4) the court must weigh the competing interests of the parties and the public; and finally, (5) the closure or sealing order must be

no broader in its application or duration than necessary to serve its purpose. *See Dreiling*, 151 Wn.2d at 913-15 (quoting *Ishikawa*, 97 Wn.2d at 37-39).

[40] ¶53 Here, the trial court applied the *Ishikawa* factors when considering the County's motion to seal and correctly found that the County could not make the required showing. For instance, the County simply cannot show that sealing is needed (first *Ishikawa* factor). As previously noted, while the tone of the September 7 e-mail may have been embarrassing for the prosecutor, the information that it contained was already known to both parties and was a matter of public record. The trial court correctly determined that the e-mail "is, at best, innocuous and at worst, embarrassing: these are not the types of interests allowed to be protected by the court under these circumstances." CP at 1066-67.

¶54 The County's interest in sealing from public view the content of an innocuous e-mail does not outweigh the public's right to open access to court proceedings. *Rufer*, 154 Wn.2d at 541-42. Accordingly, we hold that the trial court applied the correct legal standard and did not abuse its discretion in declining to seal the September 7 e-mail under the circumstances of this case.

VI. AMICUS BRIEF AND MOTIONS PASSED TO THE MERITS

[41] ¶55 The brief of amici contends that the parties and the trial court were wrong in agreeing that if destruction of public records comports with the records retention act, chapter 40.14 RCW, such destruction does not violate the PRA, chapter 42.56 RCW. Amici argue that the destruction of the two e-mails from the secretary of state's office violated the PRA regardless of whether their destruction complied with chapter 40.14 RCW and applicable retention and destruction schedules. Amici urge us to clarify that the PRA trumps the records retention act. Further, amici suggest a new rule. Assuming that the County violated the PRA when it did not provide a record that had long since been destroyed prior to any PRA request for that record,

amici suggest that any fines imposed under the PRA for the agency's nonproduction of the previously destroyed record be limited to one year. These are new issues argued only by amici, and for that reason we decline to address them. *See State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (arguments raised only by amici curiae need not be considered); *see also* RAP 9.12 (when reviewing an order granting or denying summary judgment, the appellate court will consider only evidence and issues called to the trial court's attention).¹²

¶56 As for the motions passed to the merits, we deny BIAW's motion to substitute as a party McCarthy's successor to the auditor's office. Given our disposition of this case—affirming the trial court's dismissal of BIAW's PRA claim and the court's dismissal of the County's counterclaim—the substitution issue is moot. We also deny BIAW's and the County's respective motions to strike each other's statements of additional authorities.¹³ Moreover, we have reviewed the cases contained in those statements and determined that they provide no basis for altering our decision.

¹² "[T]he case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court." *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (internal quotation marks omitted) (quoting *Lorentzen v. Deere Mfg. Co.*, 245 Iowa 1317, 1323, 66 N.W.2d 499 (1954)). This is a long established practice of Washington courts to which we adhere. *See, e.g., Walker v. Wiley*, 177 Wash. 483, 491, 32 P.2d 1062 (1934); *Gonzalez*, 110 Wn.2d at 752 n.2 (citing cases); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 629 n.30, 90 P.3d 659 (2004). As noted, amici's issues are their own and do not appear in the parties' briefing to this court. Accordingly, even had the parties raised these issues to the trial court but failed to continue to press those arguments on appeal, relying instead on amici to so argue, we would consider the arguments abandoned and not address them. *See Walker*, 177 Wash. at 491. In this case, the arguments of amici were never presented to the trial court and thus court rule directs us not to consider them when reviewing the summary judgment decision. *See* RAP 9.12; *see also Sourakli*, 144 Wn. App. at 509 (citing RAP 9.12 as basis for declining to consider argument not made to the trial court); *Coronado v. Orona*, 137 Wn. App. 308, 318, 153 P.3d 217 (2007) (RAP 9.12 limits our review to issues brought to the trial court's attention).

¹³ The County's statement cites *Fisk v. City of Kirkland*, 164 Wn.2d 891, 194 P.3d 984 (2008), and *Ameriquest Mortgage Co. v. Attorney General*, 148 Wn. App. 145, 199 P.3d 468 (2009). BIAW's statement cites *State ex rel. Toledo Blade Co. v. Seneca County Board of Commissioners*, 120 Ohio St. 3d 372, 2008-Ohio-6253, 899 N.E.2d 961.

VII. ATTORNEY FEES

[42] ¶57 Both parties seek attorney fees. BIAW requests reasonable attorney fees and costs on appeal, citing RCW 42.56.550(4) as the authority for such award. The statute provides in pertinent part that “[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record . . . shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.” RCW 42.56.550(4). By its terms, the statute only provides for fees to the *prevailing party*. BIAW did not prevail below. The trial court awarded statutory fees of \$200 to the County as the prevailing party. Nor has BIAW prevailed on appeal. Accordingly, we deny BIAW’s request for fees.

[43, 44] ¶58 The County contends that “CR 11 authorizes an award of fees and costs to defendants both below and now on appeal.” Br. of Resp’t/Cross-App. at 46. However, the trial court awarded no CR 11 sanctions, and the rule is intended for use in superior court, not in the appellate court. While CR 11 sanctions were formerly available on appeal under RAP 18.7, a 1994 amendment to RAP 18.7 and 18.9 eliminated the reference to CR 11 in RAP 18.7 and provided for sanctions on appeal only under RAP 18.9. See 3 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 18.7 author’s cmt. 2, at 445 (6th ed. 2004). Moreover, Washington follows the “American rule,” which provides that fees and expenses are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). Because the County has not identified an applicable basis for awarding it fees, we deny the County’s fee request.

¶59 We affirm the trial court, deny BIAW’s motion to substitute a party, deny both parties’ motions to strike the other’s statement of additional authorities, and deny both parties’ requests for fees on appeal.

HOUGHTON and ARMSTRONG, JJ., concur.

[No. 26801-2-III. Division Three. October 15, 2009.]

THE STATE OF WASHINGTON, *Respondent*, v. ARTURO GOMEZ,
Appellant.

- [1] **Escape — Second Degree Escape — Detention Facility — Determination — Question of Law or Fact — Review — Standard of Review.** For purposes of a prosecution for second degree escape under RCW 9A.76.120(1)(a), which defines the offense as knowingly escaping from a detention facility, the determination of whether the configuration of the particular facility and the defendant’s status when brought to the facility make the facility a “detention facility” within the meaning of RCW 9A.76.010(2)(a), which defines “detention facility” as “any place used for the confinement of a person . . . arrested for, charged with[,] or convicted of any crime,” is a question of law that is reviewed de novo.
- [2] **Escape — Second Degree Escape — Detention Facility — Place of Confinement — Booking Room of County Jail — Handcuffing to Chair Bolted to Floor.** Where a person is placed under arrest, transported to the booking room of the county jail, and handcuffed to a chair bolted to the floor of the booking room, the booking room constitutes a “detention facility” within the meaning of RCW 9A.76.010(2)(a) and the person’s escape therefrom will support a charge of second degree escape under RCW 9A.76.120(1)(a).

Nature of Action: Prosecution for second degree escape, third degree driving while license suspended or revoked, obstructing a law enforcement officer, and unlawful possession of a controlled substance.

Superior Court: The Superior Court for Garfield County, No. 07-1-00012-1, William D. Acey, J., on January 9, 2008, entered a judgment on a verdict finding the defendant guilty of second degree escape, third degree driving while license suspended, and obstructing a law enforcement officer.

Court of Appeals: Holding that the defendant knowingly escaped from a detention facility where, after he was arrested, he was taken to the booking area of the county jail, handcuffed to a chair that was bolted to the floor of the booking room, slipped out of handcuffs, and left the facility, the court *affirms* the judgment.

David N. Gasch (of Gasch Law Office), for appellant.