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66630-4

No: 66630-4-1

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

SUSAN FORBES,

Appellant

v.

CITY OF GOLD BAR,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
HONORABLE DAVID KURTZ

BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR AND RELATED ISSUES

1. The Trial Court erred when it dismissed the Plaintiff's Motion for Partial Summary Judgment for failure of Defendant to answer public records requests in a timely manner and Motion for In-Camera Review of over three-thousand records the Defendant admitted it silently withheld and unilaterally declared not-conduct of government business thus exempt.

Issues:

- a) The Trial Court Committed Reversible Error when it held that Defendant's release of twenty eight thousand two hundred ninety (28,290) email records was reasonable to suggest actual compliance with Plaintiff's public records requests in this era of limited resources.
2. The Trial Court abused its discretion when it refused to conduct an in-camera review of the over three-thousand email records the Defendant silently withheld as not-conduct of government business and refused to log, label and state statutory exemptions thus depriving the Plaintiff an opportunity to challenge the Defendant's silent withholding of records.

Issues:

- a) Whether or not an Agency is required to log, label and state the statutory exemptions of records it unilaterally claims exempt from disclosure under the Public Records Act when the record documents that public employees used personal email addresses and other electronic devices to conduct government business?
- b.) Whether or not an Agency's that fails to implement adequate policies against employees using personal email accounts must conduct a search of personal email accounts to comply with the Public Records Act?

Issues:

- a) The Trial Court erred when it refused to order the Defendant to pay attorney fees, cost and penalties when the record documents that the Defendant failed to answer Plaintiff's public records requests for over a year and half forcing Plaintiff to file suit seeking access to the records.
- b) Whether the Plaintiff is entitled to penalties and attorney fees where the evidence establishes the Defendant violated the Public Records Act.

A. STATEMENT OF THE CASE

I. Introduction

This cases revolves around three public records requests that Appellant Susan Forbes (Forbes) requested from the City of Gold Bar. Instead of answering Forbes's public records requests, the City simply waited for Forbes's to file a lawsuit under the Washington Public Records Act, RCW 42.56, seeking access to public records alleging that the City failed to comply with requests for over a year and withheld thousands of readily available records it had in its possession at the time of Forbes's first public records request. CP 75-84.

On Defendant's Motion to Dismiss on Show Cause Proceeding and Plaintiff's Cross Motion Opposing Dismissal In Favor of Plaintiff's Motion for Partial Summary Judgment and Motion for an In-Camera Review, the trial court dismissed Forbes's case. CP 2-3. The court found, among other things, that the Defendant had met its burden under the Public Records Act by showing that it "acted reasonably ..." and that Forbes's public records requests amounted to a "fishing expedition." *See* Oral Argument at 24, ¶ 13.

In this appeal Forbes contends that trial court's dismissal of her suit held that (1) the Defendant was the prevailing party; (2) Plaintiff was not entitled to an in-camera review of the over three-thousand (3,000) records the Defendant silently withheld from disclosure; (3) Defendant's refusal to log, label and state statutory exemptions is permissible under the Public Records Act; *and* (4) the City's reasonable compliance was sufficient to establish actual compliance under the Public Records Act in this era of limited resources.

II. Statement of Facts

Forbes requested access to public records held by the City on May 20, November 9, 2009, and March 20, 2010. CP 62-68; CP 433-444. Forbes served as a Gold Bar Planning Commissioner from 2000 to 2009. Forbes's public records requests began after former Mayor Crystal Hill (Hill) sent Forbes an email asking for a one-on-one meeting with Forbes while a "public hearing" was taking place. Forbes believed

that Hill was trying to interfere with her vote and had used email communication to communicate with Gold Bar's Planning Commission Chair Kelly Broyles, sent the City of Gold Bar her first public records request. CP 62.

Forbes's public records requests and the City's responses to those requests in chronological order:

Forbes # 1 Public Records Request on May 20, 2009:

all letters and emails between Mayor Hill and all City Council members mentioning Susan Forbes and all emails between Mayor Hill and Planning Commissioner Kelly Broyles mentioning Susan Forbes from January 1, 2009 to present. Also, all emails between City Staff and Mayor Hill mentioning Susan Forbes for January 1, 2009 to present.

CP 62; CP 93-101.

Respondent's Continuous Responses to Forbes May 20, 2009 Public Records Request:

On or about May 26, 2009 the City responded to the request by a letter stating that the City was in the process of collecting and reviewing the documents responsive to the plaintiffs request and anticipated a response by 5:00pm on Friday, June 19, 2009.

On or about June 19, 2009 the City responded to the request by a letter extending the anticipated response time to 5:00 Friday, July 10, 2009.

On or about July 10, 2009 the City responded to the request by a letter extending the anticipated response time to 5:00pm on Friday, August 12, 2009.

On or about August 12, 2009 the City responded to the request by a letter extending the anticipated response time to 5:00pm on Friday October 2, 2009.

On or about October 2, 2009 the City responded to the request by a letter extending the anticipated response time to 5:00pm on Friday, November 6, 2009.

On or about November 6, 2009 the City responded to the request by a letter extending the anticipated response time to 5:00pm on Friday, January 15, 2010.

CP 94-95; CP 434.

In June 2009 Forbes registered to run for city council, and soon thereafter Hill resigned as Gold Bar's mayor while her home was in foreclosure. After receiving information that lead Forbes to believe that then current council member Dorothy Croshaw, current Mayor Joseph Beavers (Beavers) and city staff were using taxpayer resources and public facilities to support her opponent Christopher Wright, Forbes requested additional public records. CP 436-437; *See* Declaration of Susan Forbes, dated December 27, 2010, CP 97.

Forbes # 2 Public Records Request dated November 11, 2009.

Pursuant to RCW Chapter 42.56, please provide me with copies of the following public records:

(i) All emails sent by or received by Dorothy Croshaw and all elected or appointed council, the Mayor and all City Staff, and Christopher Wright which in any way relates to Susan Forbes. Again, this is a purposeful broad public records request intended to obtain all emails (including any attachments to those emails) sent to or received by Dorothy Croshaw from any Gold Bar official, whether a governmental or private computer system or electronic device was used, it's subject to the Washington State Public Records Act; see *Mechling v. Monroe*.

For those responsive records that currently exist in electronic format (such as email, Word, or PDF files), please provide those documents in such native format by copying the files onto a CDR or DVD. For those documents which exist only in paper form, please scan those documents into PDF files and copy those files onto a CDR or DVD. Where paper copies of records available in electronic form contain handwritten marks or notes, please provide both the native electronic record and a copy of the paper record as well as all metadata.

This request specifically includes— and you are specifically directed to obtain, preserve in native format, and produce — any records that exist on personal computers, portable phones, Blackberries, or other devices, or in personal email, data, voice mail, or text mail accounts owned or controlled by any officer, employee or agent of the County.

For each record that you contend is exempt from public disclosure, please specifically identify the record by subject, title, author, custodian and date, and specifically state how the specific statutory exemption applies to the record as required by RCW 42.56.210(3). For each record that is only partially exempt from public disclosure, please provide a redacted copy of that record. Failure to comply with this request for public records may require you to pay attorney fees as well as mandatory penalties under RCW 42.56.550(4). *Yousoufian v. Sims*, 152 Wn.2d 421, 433, 98 P.3d 463 (2005).

Whether or not the City asserts that any requested records are exempt from disclosure you are required by RCW 42.56.100 to protect all records from loss or destruction until this matter is resolved.

Please let me know if the cost of copying these records will exceed \$50.00. You have five (5) days to respond to this request as required by RCW 42.56.520

CP 64-65.

On or about January 12, 2010 the City responded to the request by a letter extending the anticipated response time to 5:00pm on Friday, February 15, 2010.

- Note gap in dates from 15th to 23rd. 8 days past promised date.

On or about February 23, 2010 the City responded with an email stating

We are mailing a CD of the Crystal Hill Blackberry emails for January 2009 in their “native” format, i.e. as pst files. Instructions are included for importing these emails into your Outlook email service on your computer. and extending the anticipated date for a second installment to March 12, 2010.

- Note that the original request was not for all of Crystal Hills Blackberry emails.

On or about March 9, 2010 the City responded with an email stating

We are mailing a CD of the Crystal Hill AOL emails for 2005 through 2009 as pdf image copies with a searchable pdf log. This format is the same as the emails previously sent to you in pdf format.

This is the second installment on the Hill AOL emails.

Our next installment on the Hill AOL emails is scheduled to be as pst files, same as the Blackberry files sent to you earlier. We are currently evaluating our new hardware and software systems for use in public document retrieval for system-wide emails.

The City will update you on the status of the evaluation and the effect on future releases on or before March 31, 2010.

On or about March 30, 2010 the City responded with an email stating

The City of Gold Bar has updated its computer hardware and software in order to improve its response to requests for records of electronic communications. The equipment has been installed and retrievals have been performed in order to test the system.

After the initial tests, it was evident that the data structure of the retained emails made it extremely tedious, and therefore difficult, to efficiently retrieve requested records. This came about because the emails are stored in multiple folders and different accounts, arranged for most efficient running of City business. This arrangement is not the most efficient for retrieval of multiple records across multiple folder accounts.

The data files have now been duplicated and are being arranged in a manner for most efficient retrieval of multiple records from multiple folder accounts. The end result is that all emails retained by the City through 2009 have been duplicated and put into yearly folders. That is, all emails sent/received in 2006 are in 2006 folders, all emails sent/received in 2007 are in 2007 folders, etc.

The emails are now being sorted into three categories: "non-exempt" which will be released in pst folders "redacted" which will be released as pdf files "not conduct of government" which will be held for in camera review if needed. This sorting is time-intensive, but will produce a file set of better quality and completeness than has been available previously.

The first set to be processed is the 2009 emails. The sorting of these emails will take another 6 weeks by our current estimation. At that time all "as-is" emails will be made available in a pst folder on a DVD for anyone who requests such. The redaction effort will take longer, we do not yet have an accurate estimate on that. After 2009, we will proceed to the 2008 emails, then 2007, then 2006. Therefore, the City requires additional time to process records requests for emails. All emails will be available on DVD as their processing is completed. Once all emails are processed for

retrieval purposes, the City will review all past requests and continue on with the specific actions necessary to complete those requests.

Records requests for non-electronic communications will continue to be processed as well.

The City anticipates a response and will update you on our progress on or before May 14, 2010.

On or about May 14, 2010 the City responded as follows:

The City replied to you on March 30 as:

“The City anticipates a response and will update you on our progress on or before May 14, 2010.”

We made an initial sort of the 2009 emails into the three categories as noted in the March 30 email. The City is continuing to review these records and is seeking legal advice from our new City Attorney on its response. Because of the large volume, and recent change of attorneys, this process is taking longer than previously anticipated. In addition, the City is evaluating whether any of the records being requested will require notice to persons named in the record, or to whom a record specifically pertains, that release of a record has been requested pursuant to RCW 42.56.540.

The City will update you on our progress on or before Friday, May 28, 2010.

On or about November 16, 2009 the City responded by stating

“The City anticipates a response to your request by 5:00 PM on Friday, January 15, 2010.

On or about January 13, 2010 the City responded by stating:

The City is currently processing a large backlog of emails of Crystal Hill and council members in accordance with the Public Records Act and subsequent Court decisions.

The Hill emails are the first of the backlog to be processed, followed by the council members emails. The emails of Dorothy Croshaw will be processed once the Hill emails are finished.

The City anticipates a further response on or before 5:00 PM on Friday February 15, 2010.

On or about February 12, 2010 the City responded by stating

The City has been upgrading its computer system and software in order to provide more complete and easier to use responses to requestors. The first response with emails in pst folders has gone out to you today as a test to insure requestors can utilize the files as presented.

This effort will allow requestors to more easily obtain and inspect records. However, this effort has absorbed our search resources during this time. You will benefit from this improvement effort in your other requests, as you will see in future releases, but it has taken time from responding to your specific request below.

The City will respond to your specific request on or before March 12, 2009.

CP 433-444; CP 437-440.

Forbes's third public records request sought additional public records after Forbes read an email from Hill to Gold Bar's IT contractor Michael Meyers Computers (Eastside) in which Hill declared that all of her Blackberry messages were "private." Hill used several private email addresses and a Blackberry device as a repository for government records. CP 68; CP 74-84; CP 98.

Forbes # 3 Public Records Request on March 12, 2010:

Pursuant to RCW Chapter 42.56, please provide me with copies of the following public records:

All text messages and photos sent by Mayor Hill to all elected or appointed council, all elected and appointed Snohomish County employees, and all City Staff, present and past during regular business hours for City Hall from January of 2006 to date of her resignation. All

text messages and photos received by Mayor Hill from all elected or appointed City council, all elected and appointed Snohomish County employees, and all City Staff, present and past during regular business hours for City Hall from January of 2006 to date of her resignation. Again, this is a purposeful broad public records request intended to obtain all text messages and photos (including any attachments to those) sent by Mayor Hill to any Gold Bar official, whether a governmental or private phone system or electronic device was used, it's subject to the Washington State Public Records Act;

For those responsive records that currently exist in electronic format (such as email, Word, or PDF files), please provide those documents in such native format by copying the files onto a CDR or DVD. For those documents which exist only in paper form, please scan those documents into PDF files and copy those files onto a CDR or DVD. Where paper copies of records available in electronic form contain handwritten marks or notes, please provide both the native electronic record and a copy of the paper record as well as all metadata.

This request specifically includes—and you are specifically directed to obtain, preserve in native format, and produce—any records that exist on personal computers, portable phones, Blackberries, or other devices, or in personal email, data, voice mail, or text mail accounts owned or controlled by Mayor Hill all elected or appointed council, all elected and appointed Snohomish County employees, and all City Staff,

For each record that you contend is exempt from public disclosure, please specifically identify the record by subject, title, author, custodian and date, and specifically state how the specific statutory exemption applies to the record as required by RCW 42.56.210(3). For each record that is only partially exempt from public disclosure, please provide a redacted copy of that record. Failure to comply with this request for public records may require you to pay attorney fees as well as mandatory penalties under RCW 42.56.550(4). *Yousoufian v. Sims*, 152 Wn.2d 421, 433, 98 P.3d 463 (2005).

Whether or not the City asserts that any requested records are exempt from disclosure you are required by RCW 42.56.100 to protect all records from loss or destruction until this matter is resolved.

Please let me know if the cost of copying these records will exceed \$50.00. You have five (5) days to respond to this request as required by RCW 42.56.520

On or about March 15, 2010 the City responded by stating:

We are currently evaluating our new hardware and software systems for use in public document retrieval for system-wide emails.

The City will update you on the status of the evaluation and the effect on future releases on or before March 31, 2010.

On or about March 30, 2010 the City further responded by stating:

The City of Gold Bar has updated its computer hardware and software in order to improve its response to requests for records of electronic communications. The equipment has been installed and retrievals have been performed in order to test the system.

After the initial tests, it was evident that the data structure of the retained emails made it extremely tedious, and therefore difficult, to efficiently retrieve requested records. This came about because the emails are stored in multiple folders and different accounts, arranged for most efficient running of City business. This arrangement is not the most efficient for retrieval of multiple records across multiple folder accounts.

The data files have now been duplicated and are being arranged in a manner for most efficient retrieval of multiple records from multiple folder accounts. The end result is that all emails retained by the City through 2009 have been duplicated and put into yearly folders. That is, all emails sent/received in 2006 are in 2006 folders, all emails sent/received in 2007 are in 2007 folders, etc.

The emails are now being sorted into three categories: "non-exempt" which will be released in .pst folders "redacted" which will be released as pdf files "not conduct of government" which will be held for in camera review if needed. This sorting is time-intensive, but will produce a file set of better quality and completeness than has been available previously.

The first set to be processed is the 2009 emails. The sorting of these emails will take another 6 weeks by our current estimation. At that time all "as-is" emails will be made available in a pst folder on a DVD for anyone who requests such. The redaction effort will take longer, we do not yet have an accurate estimate on that. After 2009, we will proceed to the 2008 emails, then 2007, then 2006. Therefore, the City requires additional time to process records requests for emails. All emails will be available on DVD as their processing is completed. Once all emails are processed for

retrieval purposes, the City will review all past requests and continue on with the specific actions necessary to complete those requests.

Records requests for non-electronic communications will continue to be processed as well. The City anticipates a response and will update you on our progress on or before May 14, 2010

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The City replied to you on March 30 as:

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On or about March 23, 2010 the City responded by stating

We are currently implementing our new hardware and software systems for use in public document retrieval for system-wide emails.

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The City will update you on our progress on or before Friday, May 28, 2010.

CP 433 -442.

On May 17, 2010, after receiving continuous extension letters for over a year and a half, Pro Se Forbes filed suit seeking access to public records CP 433-443. The Record establishes that the Defendant had thousands of records readily available in .pst format since May 2009. CP 119; CP 81-82. Instead of providing Forbes copies of what the city had in its possession for over a year and half, the city failed to release any records until six months *after* Forbes's filed suit. CP 93-101. The evidence of the record documents that Beavers is hiding public records. CP 72.

Through pleadings and Oral Argument, Forbes declared that the City failed to comply with three very simple requests forcing her to file suit seeking access to records. CP 93-100. The City's own evidence does not support that it released any records until October 25, 2010. CP 202-204. This prompted Forbes to consider conducting discovery in October 2010. Since Eastside had a contract to retrieve the City's records, Forbes notified City's counsel and Eastside of her intention to depose Eastside. In December 2010 Forbes's sent Defendant's counsel and Eastside a Notice of Deposition for Eastside. CP 27-28; CP 43-60. The City refused to produce Eastside for deposition but during Defendant's Motion to Dismiss, Defendant's counsel assisted Eastside with his Declaration to the trial court. CP 325-329.

In early December 2010, while Forbes was in the middle of conducting discovery, Defendant's counsel filed a Motion to Dismiss on Show Cause Proceeding. CP 330-356. It was through Beavers Declaration to the trial court that Forbes first learned that the Defendant was alleging that it actually released responsive records to Forbes's three public records requests. CP 178 – 192. Forbes's continues to refute City's assertion that it complied with her specific public records requests. CP 93-101; CP 136.

While Defendant's counsel was writing a Motion to Dismiss, Beavers requested a one-on-one meeting with Forbes. Beavers and Forbes's did meet and confer, and with the permission of both parties, Forbes's recorded the interview. CP 131 -174. During the meeting, Beavers stated that the City had no legal duty to log and label records that it deemed not conduct of government business. CP 136. Defendant's counsel also stated during Oral Argument that the City was under no legal duty to log and label records it claimed as private. City's counsel during Oral Argument for the first time appeared to be asserting a Fourth Amendment Constitutional argument, but counsel failed to raises this issue in her Motion, the trial court correctly ignored Defendant's argument. *See* Oral Argument at 10-11, ¶¶ 22-25, ¶¶ 1-9, respectively.

In a nutshell, this case is about the City's refusal to comply with the Public Records Act which forced Forbes to file suit seeking access to records. Instead of providing readily available electronic records (.pst) records the City had in its possession one week prior to and months following Forbes's first public records request, the City unilaterally printed off paper documents, scanned them onto a CD, and still waited over a year and half before releasing any records it had in its possession. CP 202-217. The City further failed to log, label and state statutory exemptions on email records it silently withheld from Forbes. Email communication which is part of this record confirms that Beavers is hiding public records. CP 72; CP 108.

III. Procedural History

In her complaint Forbes correctly named as defendants the City of Gold Bar.

CP 433. Through motions, pleadings and Oral Argument, the City and Forbes laid out the relevant facts which are the basis of this appeal. For the convenience of this court, these facts are recited at some length.

2. Agency Admits It Silently Withheld Records And Failed to Log, Label And State Exemptions.

Ms. King: With respect to the argument that we violated the Public Records Act by failing to provide a log of the nonconduct [sic] government e-mails, I addressed that in my reply. It is the City's position that only exemptions that were are claiming under the Public Records Act require the City to provide a log and list the exemption because these are not public records because these are private e-mails that we inadvertently obtained when attempted to download the public documents off of their private computer systems. There is no requirement for a log, and, in fact, the City would probably run into some Fourth Amendment issues trying to go through their private emails and log them.

So there—at least, it's our position that is no case law or law to support it either under statute or case law, that the City is required to provide a log for the nonconduct [sic] government e-mails, they are not public records; and therefore, we have not violated the Act by no providing such a log.

THE COURT: Very well, Ms. Forbes, I will hear from you at this time.

MS. FORBES: Your honor, despite what Ms. King believe, I do believe that the Mechling verses Monroe case pretty well lays out what a log should be. It does state they should be required to keep a log even if it's just a numerical number log of all records. At point in time, which no log and pretty much someone just saying this is this category, throwing it in there, we have no way to know what's in that specific category what they call nonconducted government. They could put anything in there that they wanted, and it's not logged. So we have no way to know whether it truly is or is not conduct of government.

If I may read what I have here, it's the description of what a log is from the Mechling verses Monroe.

THE COURT: This is your oral argument, so go ahead.

MS. FORBES: The identification of information need not be elaborate but should include the type of records, its date, number of pages, and unless

otherwise protected, the author and the recipient, or if protected, other means to sufficiency identifying the particular records without disclosing the protected content. Where use of identifying features whatever would reveal protect content, the agency needed to designate the records by numbered sequence, which is from Mechling verses Monroe case, which is a current Snohomish County case.

See Oral Argument at 10-12.

The Court also explored the City's refusal to log and label records:

THE COURT: How many private e-mails are we talking about?

MAYOR BEAVERS: 3,000.

MS. KING: Over 3,000.

See Oral Argument at 18 ¶¶ 2-5.

On December 6, 2010 Defendant filed a Motion to Dismiss on Show Cause Proceeding while Plaintiff was in the middle of conducting discovery. CP 330. Pro Se Forbes responded by filing a cross Motion for In-Camera Review and a Motion In Favor of Partial Summary Judgment on the timeliness claim; she also filed a Motion Opposing Dismissal On Show Cause Proceeding. CP 26-101.

On January 6, 2011, during Oral Argument Judge Kurtz stated:

“ . . . Having stated the importance of public disclosure in a free society, the Court does, and should also recognize efforts by entities if they act reasonably in response to public disclosures requests, particularly, in this era of limited public resources...”

See Oral Argument at 23, ¶¶ 8-12,

The trial court appeared to have based its decision on the Declaration of Beavers. *See Oral Argument at 25-26.* Beavers Declaration to the trial court does not support that the City ever complied with Forbes's public records requests. CP 178-321. Eastside's Declaration to the trial court does not support the City's assertion that it complied with Forbes's public records request. CP 325-329. Forbes's Declaration to the trial court supports that the City did not comply with her public records request. CP 93-101. The evidence of record also confirms that Beavers is hiding public records. CP 72; CP 108.

Judge Kurtz found that the City acted reasonably and in good faith thus complied with Forbes's public records requests and the Public Records Request. He further added that Forbes's public records requests amounted to a "fishing expedition." See Oral Argument at 24 ¶¶ 12-13. The Court therefore denied the Plaintiff's Cross-Motion for Partial Summary Judgment on the timeliness claim and denied her motion to lodge public records for an in-camera review. CP 443; See Oral Argument at 13 ¶¶ 10-18.

On January 6, 2011 the trial court entered its final order denying the Plaintiff's Motion for Partial Summary Judgment and Motion for In-Camera review and granted the Defendant's Motion to Dismiss on Show Cause Proceeding. Forbes, a pro se litigant, timely filed this appeal.

B. ARGUMENT

I. Standard of Review: This Court Reviews De Novo The Trial Court's Order of Dismissal.

Courts conduct a *de novo* review of agency actions challenged under the PRA. RCW 42.56.550(3). Where the record consists entirely of declarations, affidavits and other documentary evidence, the appellate court stands in the same position as the trial court and is not bound by the trial court's factual determination. Progressive Animal Welfare Soc'y v. University of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994) ("*PAWS II*"). This court can and should engage in the same inquiry as the trial court and review all of the facts in the record together with the trial court's finding *de novo* and make an independent determination of all matters found to be in error. Ames v. City of Fircrest, 71 Wn.App. 284, 292, 857 P.2d 1083 (1993) (with complete record, appellate court can decided issues of fact and law).

In exercising review of agency actions the statute mandates that:

Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such

examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550(3) The statute further directs Courts that “The public records subdivision of this chapter shall be liberally construed and its *exemptions narrowly* construed to promote this public policy.” RCW 42.17.251; *PAWS II*, supra at 251.

2. The Trial Court Abused Its Discretion When It (1) Held Against The Clear Weight Of The Evidence That The Defendants Did Not Violate The Public Records Act When Defendants Admitted That It Failed to Log, Label, and State Statutory Exemptions Of Over Three-Thousand Records It Silently Withheld As Not Conduct of Government Business Thus Depriving Plaintiff Of The Right Challenge Exemptions.

a. Abuse of Discretion Standard

An abuse of discretion occurs when a court’s decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Doe I v. Washington State Patrol, 80 Wash.App. 296, 302, 908 P.2d 914 (1996); ACLU v. Blaine, 95 Wash.App. 106, 975 P.2d 536 (1999). In evaluating whether a trial court has abused its discretion, our Supreme Court in State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971), articulated a two-part test:

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

Id., at 26. Under the second prong of the Junker analysis, which a determination of “reasonableness” is based, this court must review the trial court’s decision in the compelling interests of those affected by the decision, and the “comparative weight of the reasons for and against the decision one way or the other.” Junker, supra, at 26.

“The comparative and compelling public or private interests of those affected by the order or decision” in PRA litigation are “the sovereignty of the people and the accountability to the people of public officials and institutions.” PAWS II, 125 Wn.2d 243, 250-51, 884 P.2d 592 (1994); RCW 42.56.030. Our legislature enacted the Public Records Act to ensure a free and open society, and such review is entrusted to the judiciary. When the judiciary’s decision threatens the functioning of the Act, that decision must be corrected:

The Public Disclosure Act confirms that, “full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.”

PAWS II, 125 Wn.2d 243, 250-51, 884 P.2d 592 (1994), quoting RCW 42.17.010(11).

As our high court declared, “the Legislature leaves no doubt about its intent” in passing the Public Disclosure Act:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. . . . RCW 41.17.251.

Id., 125 Wn.2d at 260.

b. Trial Court Abused Its Discretion When it Held Against the Clear Weight of the Evidence That The Defendant Did Not Violate the Public Records Act.

RCW 42.56.100 requires agencies to adopt reasonable rules to ensure that citizens allowed to have “full public access to public records” and to “protect public records from damage or disorganization.” The City’s own evidence establishes that it violated at least this provision of the PRA by not adopting rules against allowing public officials to use personal email addresses and Blackberry devices as a repository for public records thus

failing to “protect public records from damage or disorganization.” RCW 42.56.100. As a result of the City’s failure to enact adequate policies against using personal email accounts and/or other personal electronic devices, a reasonable search for public records under these circumstances must include retrieval from personal email addresses and Blackberry devices.

In Mechling v. City of Monroe, 152 Wash.App. 830, 222 P.3d 808 (2009), a requestor filed suit seeking disclosure of council members email communication; council members were using personal email to communicate. This Court held that City council members' private e-mail addresses contained in e-mails discussing city business were not exempt from disclosure under former section of Public Disclosure Act (PDA), since council members' e-mail addresses were not contained in city's personnel or employment-related records.

Here the City made the same legal argument already decided in *Mechling*. The City clouded the issue by asserting that the silently withheld email communication retrieved by the City are in fact private, thus it had no duty to log, label and state a statutory exemption. Further argument was made during Oral Argument by City’s counsel asserting that a City search of the over three-thousand email records retrieved by the City would probably constitute an unreasonable search if the city did in fact search the three thousand records. This argument appears to be suggesting that the City never searched the over three-thousands email records. If true, how would the City know whether or not the email records in question are in fact private? If allowed to stand, the City’s refusal to log, label, and state statutory exemptions of the over three –thousand email records it silently withheld from disclosure would frustrate the PRA beyond this case.

The burden of proof is on the agency to show that its denial of access to public records complies with a statute which exempts, prohibits or limits disclosure of the public record. RCW 42.56.550(1). In cases of appeal, review by the court is de novo; the court is not required to defer to agency’s decision. RCW 42.56.550(3). The court is required to take into account the broad policy of the Public Records Act favoring disclosures,

regardless of whether or not such disclosure “may cause inconvenience or embarrassment to public officials and others.” Id.

In this case, the evidence of record is undisputed that the City’s employees and its public officials used personal email accounts to conduct city business. Because of the City’s failure to implement policies against use of personal email accounts, Eastside had to retrieve email communication from city employees and public officials’ personal computer systems. CP 74-84. Under the circumstance of this case, the City’s refusal to log, label and affirmatively state statutory exemptions would frustrate the Public Records Act beyond this case if allowed to stand.

Here Forbes’s public records requests requested identifiable public records which the City silently withheld from public disclosure. The City’s silent withholding and refusal to log, label and state any statutory exemptions for over three-thousand records is admission enough to establish a violation of the PRA. This admission is sufficient to establish a violation of the Public Records Act.

In Rental Housing Association v. City of Des Moines, 165 Wn. 2d. 393, 525 (2009), a public records suit arose because the agency silently withheld records from disclosure and then claimed that the requester exhausted the statute of limitations. The court held in pertinent part that:

...The City's August 17, 2005 reply letter did not **(1)** adequately describe individually the withheld records by stating the type of record withheld, date, number of pages, and author/recipient or **(2)** explain which individual exemption applied to which individual record rather than generally asserting the controversy and deliberative process exemptions as to all withheld documents. . . This argument fails because the PRA's mandate, not the requester's preference, controls when a claim of exemption is validly made.

The Court further reasoned that “Without the information a privilege log provides, a public citizen and a reviewing court cannot know **(1)** what individual records are being withheld, **(2)** which exemptions are being claimed for individual records, and **(3)** whether there is a valid basis for a claimed exemption for an individual record. Failure to provide the sort of identifying information a detailed privilege log contains defeats the very purpose of the PRA to achieve broad public access to agency records. See RCW 42.56.030. In this regard,

requiring a privilege log does not *add to* the statutory requirements, but rather effectuates them. See RCW 42.56.210(3), .550(6).

The key issue then is when a “claim of exemption” under RCW 42.56.550(6) is effectively made. We find the reasoning of PAWS II guides our resolution of this issue. This court in PAWS II addressed the issue of whether information in a university researcher's unfunded grant proposal involving use of animals in scientific research was subject to disclosure under the PRA. PAWS II, 125 Wash.2d at 247, 884 P.2d 592. Of particular significance here, the Court in PAWS II denounced the “silent withholding” of information in response to a PRA request:

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated. *Id.* at 270, 884 P.2d 592 (citation omitted).

During Oral Argument the Defendant and its counsel admitted that it failed to log, label and state statutory exemptions of over three -thousand email records it silently withheld from disclosure thus denying Forbes the right to challenge its claims that the records are in fact private and/or exempt from disclosure. *See* Oral Argument at 13. Forbes’s second and third public records request did request that the City provide a detailed log, label and state any statutory exemptions the City was claiming exempt and to protect records from loss or destruction. CP 64-65; CP 68. The City’s admission that it unilaterally and silently withheld and failed to log, label and state statutory exemptions for over three- thousand records by itself constitutes a violation of the Public Record Act. Furthermore, such agency conduct, if allowed, would frustrate the Public Records Act beyond this case.

The Public Records Act mandates broad disclosure of public records. Hearst Corp. v. Hoppe, 90 Wash.2d 123, 127, 580 P.2d 246 (1978). RCW 42.56.210(3) states,

“Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.”

The burden of proof is on the agency to show that its denial is in accord with a statute which exempts, prohibits or limits disclosure of the public record. *Id.* Review by the court is *de novo* and the court is not required to defer to the agency’s decision. RCW 42.56.550(3). The court is required to take into account the broad public policy of the PRA favoring disclosure, even if such disclosure “may cause inconvenience or embarrassment to public officials and others.” *Id.*

As established by the City’s counsel during Oral Argument:

- Ms. King: With respect to the argument that we violated the Public Records Act by failing to provide a log of the not conduct [sic] conducted government e-mails, I addressed that in my reply. It is the City’s position that only exemptions that were are claiming under the Public Records Act require the City to provide a log and list the exemption because these are not public records because these are private e-mails that we inadvertently obtained when attempted to download the public documents off of their private computer systems. There is no requirement for a log, and, in fact, the City would probably run into some Fourth Amendment issues trying to go through their private emails and log them.

So there—at least, it’s our position that is no case law or law to support it either under statute or case law, that the City is required to provide a log for the not conduct [sic] government e-mails, they are not public records; and therefore, we have not violated the Act by no providing such a log.

See Oral Argument at 10-11

In light of the forgoing admissions by the City, the court should have ordered that the City log, label, and state statutory exemptions for each record the City silently withheld from disclosure. Instead the court held that Forbes’s public records requests amounted to a “fishing expedition” and that City’s lumping the release of twenty- eight thousand two hundred and ninety records (28,290) records to various requestors was sufficient to suggest that the City acted “reasonably” thus complied with Forbes’s public

records request.

See Oral Argument at 23-29.

The court appears to have based its foregoing assumptions on the Declaration and the credibility of Beavers. But the court ignored evidence that Beavers is hiding public records. CP 92; CP 108. The Court also ignored testimony from the City’s own counsel that confirmed that the City had silently withheld over three-thousand email records without ever logging, labeling, and claiming a specific statutory exemption. This alone constitutes gross violations of the Public Records Act.

c. Trial Court Committed Reversal Error When It Held That Reasonable Compliance Is Sufficient To Establish Actual Compliance Under The Public Records Act And That Plaintiff’s Public Records Requests Amounted to A “Fishing Expedition.”

Forbes’s public records requested specific and identifiable records. The record does not establish that the City ever requested Forbes’s to clarify her requests. Forbes’s reasons for requesting public records, although not relevant under the Public Records Act, are stated herein.

In Zink v. Mesa, 140 Wash.App. 328, 166 P.3d 738, the court held that strict compliance under the Public Records Act is required and any deviation from strict compliance is reversal error. The court held in relevant part:

“ We do not doubt that the impact of the Zinks' requests on the clerk's office was significant. There is substantial evidence in the record to support the trial court's findings to this effect. However, the findings are immaterial to the legal issue before us, because the PDA requires strict compliance. *See Hearst Corp.*, 90 Wash.2d at 130, 580 P.2d 246.

The City's good faith or reasonableness does not determine whether it complied with the PDA in responding to the Zinks' record requests. *Id.* at 131–32, 580 P.2d 246. Good faith is only relevant to assessing the *amount* of damages to be awarded for violations of the PDA—an issue the trial court did not reach. Amren, 131 Wash.2d at 37–38, 929 P.2d 389. Similarly, the reasonableness of the City's actions *does not excuse* noncompliance with the PDA. *Id.* at 37, 929 P.2d 389. As our Supreme Court observed in Amren, “to require unreasonable conduct as the standard for award of penalties would be inconsistent with the

strong policy of the Act to discourage improper denial of access to public records.” *Id.* at 37 n. 10, 929 P.2d 389. Finally, the PDA does not place a limit on the number of record requests an individual can make. We therefore hold that the trial court erred when it concluded substantial compliance with PDA provisions was sufficient.

Quoting from the trial court’s transcript, the Judge Kurtz concluded:

“ . . . Having stated the importance of public disclosure in a free society, the Court does, and should also recognize efforts by entities if they act reasonably in response to public disclosures requests, particularly, in this era of limited public resources... when one adds that up, I believe that comes to a total of 11 disclosures for a total of 28,290 records or documents made available. Now, this is admittedly not determinative of itself. But any fair-minded observer would conclude that that is a huge number -- and suggests and indicates that the City has, indeed, made good faith efforts at compliance with the public disclosure requests in this matter... The City has met its burden of showing that it has acted reasonably – not perfectly, perhaps—but perfection is not required. The City has acted reasonably; and accordingly, the bottom line is that the City’s motion to dismiss shall be granted and plaintiff’s cross motions are respectfully denied....”

See Oral Argument at 23-29.

The *Zink* court held that reasonable compliance in public records cases was not sufficient to establish that the City actually complied with the Public Records Act. Simply put, the trial court’s ruling in Forbes’s case that the City’s showing that it released 28,290 records to various requesters, whether or not responsive to Forbes’s public records requests, somehow suggests that the City legally complied with the Public Records Act constitutes reversal error.

e. Trial Court Abused Its Discretion When It Dismissed Plaintiff’s Suit Without An In-Camera Review of Over Three Thousand Records The Defendant Silently Withheld From Disclosure.

Courts may conduct an in-camera review of the records. RCW 42.17.340(3)/RCW42.56.550(3). Appellate Courts will review the trial court’s decision of whether or not to perform an *in camera review* for abuse of discretion. *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn.App. 319, 328, 890 P.2d 544

(1995). Such review is required when it is necessary to determine the applicability of a particular exemption. Overlake Fund v. City of Bellevue, 60 Wn.App.787, 797, 810 P.2d 597, review denied, 117 Wn.2d 1022 (1991)(remanding to trial court for in-camera review pertaining to a hotel development proposal; trial court had previously denied disclosures without conducting an *in-camera* review).

During Oral Argument the City admitted for first the time that it silently withheld over three-thousand email records it unilaterally deemed private. The City's own evidence documents that it failed to log, label and claim any exemptions of the over three-thousand email records thus depriving Forbes's the right to challenge the City's claims that the records were in fact "private" thus exempt from disclosure.

In Limstrom v. Ladenburg (*Limstrom II*), 136 Wn.2d 595, 963 P.2d 869 (1986), the court remanded a case for an *in-camera* review of records claimed to be work product and finding that "in this case the only way that a court can accurately determine what portions, if any, of the files are exempt from disclosure is by an *in-camera* review of the files.") (citation omitted). Forbes's argues that without an in-camera review of records the City silently withheld as exempt from disclosure, as well as an adequate log affirmatively stating statutory exemptions, the court had no legal basis to find in favor of the Defendant under the Public Records Act.

f. Trial Court Abused Its Discretion When It Held That Plaintiff Was Not The Prevailing Party Under The Public Records Act After Plaintiff Was Forced To File Suit As A Result Of Defendant's Refusal To Answer Public Records Request For Over A Year And A Half.

A plaintiff is the "prevailing party" for purposes of public disclosure act authorizing award of costs, including attorney fees, to prevailing party, and certain monetary penalties, if prosecution of the action could reasonably be regarded as necessary to obtain the information, and the existence of the lawsuit had a causative effect on the release of the information. RCW 42.17.260, 42.17.340. After waiting for a year and a half for the City to answer public records it had in its possession at the time of

Forbes's public records request, the record confirms that it did not begin to answer Forbes's request until October 2010, or five months *after* Forbes's filed suit seeking access to records. CP 202. A reasonable inference and the close temporal proximity to the City's actions reasonably infers that existence of Forbes's suit had a causative effect on the City's decision to finally start addressing Forbes's public records requests.

In Sanders v State of Washington, 169 Wash.2d at 827, 870, 240 P.3d 120, the Court held that determination of the prevailing party in an appeal of a Public Records Act judgment relates to the question whether the records should have been disclosed on request and whether the requestor had a right to receive a response. Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. RCW 42.56.550(4).

E. Relief Requested

In light of the foregoing argument and authority, Forbes's respectfully request this Court grant the following relief: (1) issue an order ordering the City to log, label and state a statutory exemption for each record it silently withheld from disclosure; (2) reverse the trial court's order dismissing her complaint for access to public records and remand to for further proceeding including an in-camera review of the over three – thousand records the city silently withheld from disclosure; and (3) award Appellant the full allotment of all attorney fees and cost incurred pursuant to RAP 18.1 and RCW 42.56.550(4), which states:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

The appropriate course is to remand to the trial court to make specific findings under the proper legal analysis and provide a suitable remedy. Dawson v. Daly, 120 Wash.2d 782, 792, 845 P.2d 995 (1993).

F. Conclusion

For the foregoing reasons, Forbes's respectfully request relief.

Respectfully submitted on this 16th day of September 2011.



Anne K Block, WSBA No. 37640
Attorney for the Appellant

DECLARATION OF SERVICE

I, Chris Forbes, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action and a competent witness herein.
2. On the 16th day of September 2011, I served a true copy of the Brief of the Appellant on the following counsel of record in person at the following address:

Attorneys Margaret King and Kari Sand
11 Front St South
Issaquah, WA 98027-3820
United States

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

Dated this 16th day of September 2011, at Monroe, Washington



Chris Forbes

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