

COA# 38254-7
No. 81094-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,
Washington not-for-profit corporation,

CLERK
Petitioner

v.

PAT McCARTHY, in her official capacity as Pierce County Auditor;
PIERCE COUNTY, Washington, a Municipal Corporation,

Respondents.

Appellant is

PETITIONER'S OPENING BRIEF

Greg Overstreet
Allied Law Group

Andrew Cook
Building Industry Ass'n of Washington
Attorneys for Appellant

1110 S. Capitol Way, Suite 225
Olympia, WA 98501
(360) 753-7510 Phone
(360) 539-0038 Fax

ALLIED
LAW GROUP

BY FORWARDED R. CARPENTIER

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I. INTRODUCTION

This case will determine whether state and local agencies can unlawfully destroy public records and thereby avoid liability under the Public Records Act (“PRA” or “Act”). In this case, the agency admitted destroying many emails, which the requestor asserts was unlawful. The agency then argued that the requestor had no PRA cause of action because the agency did not “possess” or “retain” the destroyed records. The agency’s position is that deleting records before a citizen can request them absolves the agency of PRA liability—even if the records must be retained under retention laws. The trial court seemed troubled by this assertion but, despite the fact that the burden of proof in a PRA case is on the agency, held that the requestor did not prove the (destroyed) emails existed. This Court reviews the case *de novo*.

In this appeal, the records requestor asks the Court to hold that the unlawful destruction of later-requested non-exempt public records is a “withholding” of records and therefore a violation of the PRA. Unlawfully destroying a record is a “withholding.”

The records requestor in this case is not asking the Court to hold that all agency records ever created must be retained indefinitely because

they might eventually be requested.¹ Nor is the requestor asking the Court to hold that an agency must create a new record to satisfy a request. Instead, the requestor asks the Court to hold that unlawful destruction of a later-requested non-exempt record is a “withholding.” Unlawfully destroying records cannot be a way to legally thwart a future public records request for them. Think of the incentive that would create. The Public Records Act only works if there are public records left to provide.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of July 20, 2007 granting Agency’s motion for summary judgment dismissing Requestor’s PRA claims;²
2. The trial court erred in entering the order of July 20, 2007 granting Agency’s motion for summary judgment dismissing Pat McCarthy in her official capacity as County Auditor as defendant;
3. The trial court erred in entering the order of September 7, 2007 denying Requestor’s motion for reconsideration of its July 20, 2007 order;
4. The trial court erred in entering the order of September 7, 2007 granting Agency’s motion for summary judgment on retention statute claims;
5. The trial court erred in entering the final judgment of December 14, 2007 in favor of Agency;
6. The trial court erred in entering its order of December 14, 2007 striking Exhibit A to the Declaration of Andrew Cook;
7. The trial court erred in entering its order of March 14, 2008 denying Requestor’s motion for CR 11 sanctions.

¹ See CP 731; 783, n.3; 785-786; RP (9/7/07) at 26.

² Throughout this brief, the public records requestor, Petitioner Building Industry Association of Washington, will be referred to as “Requestor” and the local government to which the request was made, Cross-Petitioners Pat McCarthy in her official capacity as County Auditor and Pierce County, will be referred to as “Agency.”

Issues Pertaining to Assignments of Error

Issue 1: Is summary judgment against a records requestor in a Public Records Act case proper when the agency asserts that it destroys most of its emails and that the requestor, without any discovery, has not presented any evidence that the destroyed emails exist?

Issue 2: Is an elected official in his or her official capacity a proper defendant in a Public Records Act case?

Issue 3: Is summary judgment on claims not made by either party proper?

Issue 4: Is an email produced to a requestor under the Public Records Act and not claimed to be exempt from disclosure under “attorney-client privilege” privileged?

Issue 5: Is a CR 11 motion seeking \$1 in sanctions proper when an opposing party, *inter alia*, bases a counterclaim in part on a demonstrably erroneous legal basis?

III. STATEMENT OF CASE

On March 22, 2007, Requestor filed a public records request with Pierce County Auditor, Pat McCarthy. CP 28-30. The Requestor asked for all records relating to or referencing voter registration applications filed by the Association of Community Organizations for Reform Now (“ACORN”) during the 2006 general election.³ CP 28. The Requestor submitted the public records request in response to a *Seattle Times* article,

³ The request sought records in all formats, including but not limited to “emails, notes, memoranda, letter, and electronic media.” CP 28. The case seems to have evolved into one about email records, but it is broader than that. However, because emails have become the focus, this brief will use the term “email” to describe the requested and withheld records. *See* RP (9/7/07) at 11 (Requestor co-counsel: “this is primarily about emails, but there are other records conceivably that are requested.”).

dated February, 23, 2007, discussing potential fraud by ACORN in the registration of voters. CP 29-30.

On April 13, 2007 the Requestor received approximately 615 pages of responsive non-email records.⁴ CP 32.

In separate public records requests to the King County Elections Department and the Secretary of State, the Requestor obtained ACORN-related emails. From the Secretary of State's Office, the Requestor obtained two emails sent on October 12, 2006 by the Secretary of State's Office to all county auditors—including Pierce County's—regarding the processing of questionable ACORN voter registration applications. CP 24; 47-49. However, the Secretary of State emails which were sent to the Pierce County Auditors Office were not provided by Pierce County in response to the Requestor's March 22, 2007 request. CP 24. The Requestor believed these Secretary of State emails to be examples of responsive records the Agency had but did not provide. CP 728-729; RP (9/7/07) at 10.⁵

⁴ This is not a case about exemptions from disclosure. The Agency has not claimed the deleted emails or any portions thereof are exempt from disclosure. *See* CP 730. The Agency claimed an exemption for originals of voter registration applications under RCW 29A.08.170. That exemption is not at issue. *See* CP 70, n.1; RP (9/7/07) at 36.

⁵ A significant portion of the Agency's briefing and argument in the trial court, and much of the trial court's final ruling, involved whether the Secretary of State emails were "public records." *See* CP 73-75; 766-767; 769-773; 774-779; RP (9/7/07) at 9-10; 37-39. However, the disclosure of these two emails—which the Requestor already obtained from another agency—was not the focus of the case. The Requestor referred to the debate about the Secretary of State emails as the "strawperson" argument. CP 728-729.

The email obtained from the King County Elections Department mentioning discussions Pierce County Elections Manager Lori Augino had with ACORN officials on October 12, 2006 concerning the potentially fraudulent voter registration forms. CP 25; 51.

On April 18, 2007, the Requestor renewed its public records request with the Agency. CP 24; 34-35. In its renewed request, the Requestor explained the existence of the Secretary of State emails and stated its belief that the Agency had failed to disclose all the requested public records. CP 34.

On April 24, 2007, the Agency sent a letter to the Requestor. CP 24; 37-38. In its letter, the Agency acknowledged that it had failed to disclose all of the requested documents and therefore had Agency staff do a “further scrubbing of all emails and files.” CP 37. *See also* CP 60. This produced 38 additional pages of public records. *Id.* According to the Agency, these 38 later-produced e-mails were not in any of the staffs’ email “in-boxes” but instead were in their “sent boxes.” *Id.* This led the Requestor to conclude that the Agency had once again deleted public records from their “in-boxes” without properly retaining them. CP 85. A majority of the newly produced public records were e-mails between Agency staff during the month of February, 2007. CP 85.

The Agency disclosed only one e-mail discussing the ACORN voter registrations for the five-month period from October, 2006 to February, 2007. CP 24; 40. The sole email was dated October 23, 2006. CP 40. (October, 2006 was the month the 1,829 ACORN voter registration forms were filed with Pierce County. CP 29.). In later proceedings, the Requestor noted that the Agency was claiming it only created one ACORN-related email for a five-month period. CP 92-93.

In the Agency's April 24, 2007 response, it failed to disclose the October 12, 2006 e-mails from the Secretary of State's Office to the Agency. CP 42-43. In a May 2, 2007 letter, the Requestor pointed this out to the Agency and reminded it of its retention and public records obligations. *Id.* But according to the Agency, the fact that the Secretary of State's Office may have retained the emails under the retention laws "does not mean that this office have [sic] kept the same e-mails." CP 37.

On May 16, 2007, counsel for the Agency stated that the Agency had disclosed all public records, and that any previous e-mails relating to the ACORN voter registration forms may have been deleted. CP 25-26. The Agency's counsel asserted that in order to find these deleted emails the Requestor would have to file a new public records request with the Agency's "IT staff." CP 26. In addition, counsel for the Agency stated that the Agency was not required to retain any of these internal e-mails

relating to the ACORN voter registration forms under the retention laws.

Id.

On May 25, 2007, the Requestor filed a Public Records Act enforcement action. CP 6-11. On the same day, the Requestor filed a motion to show cause why the Agency should not be found to have violated the Act. CP 12-22. The Requestor noted a PRA show cause hearing for July 20, 2007.⁶

On June 8, 2007, the Agency filed an answer. CP 52-57. The Agency also filed a counterclaim against the Requestor for filing a “frivolous” PRA case. CP 56.

On June 19, 2007, the Agency filed a motion for summary judgment seeking dismissal of the PRA case. CP 68-79. The Agency argued that it did not “possess” “retain” or “use” the requested records (because it destroyed them before the request) and therefore no PRA cause of action existed. CP 72-77. The Agency argued that no private cause of action existed under the retention statute, ch. 40.14 RCW. CP 77-78. (As described below, the Requestor did not raise a ch. 40.14 RCW claim.)

With its summary judgment filing, the Agency filed a declaration from Thomas Jones. CP 66-67 (attached as Appendix A). Thomas Jones

⁶ The show cause hearing notation was not part of the original designation of the Clerk Papers. Requestor has filed a Supplemental Declaration of Clerk Papers which includes the July 20, 2007 notation for a show cause hearing.

is an Information Technology Specialist for the Pierce County Information Technology Department. CP 66. His declaration described how some emails could not be recovered after a period of time if an employee deleted them. *Id.*⁷

In its summary judgment papers, the Agency claimed that “more probably than not” it deleted any responsive emails. CP 61; 64-65. The Agency also filed declarations claiming that it “generally” did not use email to communicate but rather “generally speaking” relied on face-to-face meetings to conduct business. CP 60; 64.

The Requestor pointed out several genuine issues of material facts. CP 83; 86; 90-93; 720-721; 784-786. The Requestor argued that the Agency’s apparent destruction of emails violated retention laws. CP 83; 96-99. The Requestor argued that the Agency’s rationale that it did not violate the PRA because—after apparently destroying them—it did not “possess” or “retain” responsive emails did not entitle the Agency to judgment as a matter of law. CP 99-102; 783. The Requestor argued that it should be able to conduct discovery to test the Agency’s assertions and suggested numerous specific topics for discovery to clarify factual issues

⁷ Destruction of requested public records *after* the request would clearly violate the PRA. See RCW 42.56.100. The Agency alleges emails were destroyed before the request, but no discovery was allowed to confirm this claim.

raised by the Agency's motion for summary judgment. CP 83-84; 93; 96 n.5.

The Agency replied that the Requestor did not produce evidence of the destroyed emails so the Requestor had not shown any evidence of a PRA violation. CP 79; 187. As Agency's counsel concisely put it, "They can't show that they're present. We have in fact shown in fact affirmatively that they are not present. *Ipsa facto*, they are not public records." RP (7/20/07) at 20.

On July 20, 2007 the trial court granted summary judgment in favor of the Agency. CP 197-199. The trial court agreed with the Agency that the Requestor failed to prove the existence of the allegedly destroyed emails. RP (7/20/07) at 35 (trial court: "There's no showing that they existed and I'm going to grant summary judgment on that respect.").

The Agency also sought dismissal of Pat McCarthy in her official capacity as County Auditor because, it claimed, this was a suit against Auditor McCarthy "personally." CP 189; RP (7/20/07) at 14. The Requestor corrected the Agency and noted that the suit was not against Auditor McCarthy "personally" but rather was against "Pat McCarthy, in her official capacity as Pierce County Auditor." CP 88. The Requestor also provided authority to the trial court allowing PRA cases against individual office holders in their official capacity. CP 88-89, 838-839,

967-968. The trial court dismissed Auditor McCarthy as a defendant. RP (7/20/07) at 28.

The trial court asked for additional briefing on whether the retention statute, ch. 40.14 RCW, provided a cause of action to remedy the destruction of the records. CP 198.

On July 30, 2007, the Requestor filed a timely motion for reconsideration. CP 716-717. In it, the Requestor briefed the ch. 40.14 issue. The Requestor also argued, among other things, that the PRA did not support the Agency's argument that because it did not "possess" or "retain" the records (because it destroyed them) that they were not "public records" subject to disclosure. CP 729-732.⁸ The Requestor again asked to conduct discovery. CP 782; 785; 787. The Requestor laid out a specific discovery plan, suggesting five discovery topics. CP 788. The Requestor also attached a declaration from the State Auditor concerning the ramifications of holding that an agency can unlawfully destroy email and then escape PRA liability. CP 789-790 (attached as Appendix B). Another state official, the State Archivist, provided a declaration on the correct retention requirements for the records of a county auditor's office.

⁸ As described below, on reconsideration the trial court disagreed that this was its original holding.

CP 200-715.⁹ The Agency responded by largely repeating its argument that its destruction of emails means it did not “possess” or “retain” them so they were not “public records” and therefore no PRA cause of action existed. CP 774-779.

Before the hearing on the motion for reconsideration, counsel for the Agency took the highly unusual step of writing a letter to the editor of *The Olympian* about the merits of a pending case. In his published letter to the editor, Agency’s counsel harshly criticized *The Olympian’s* August 27, 2007 editorial about the importance of the trial court reconsidering its initial ruling and holding on reconsideration that deleting emails is not a way to avoid PRA liability. CP 984.¹⁰ (This fact became relevant in the CR 11 proceeding described below.)

On September 7, 2007, the trial court ruled on the motion for reconsideration and clarified its earlier ruling. The trial court noted that Requestor’s new co-counsel was not present for the July 20, 2007 original grant of summary judgment and that no transcript of that hearing had been

⁹ The appendices to State Archivist Handfield’s declaration filed with the trial court contained a duplicate copy of Appendix C. See CP 635-715. A complete set of State Archivist Handfield’s declaration, without the duplicate appendix, can be found at CP 200-634.

¹⁰ Agency’s counsel wrote in his letter to the editor that *The Olympian* wrote editorials at the behest of BIAW: “In your attack piece ‘Public records must remain open,’ your editors published numerous misstatements about [the trial court’s] decision – apparently because they relied exclusively on press releases from the partisan litigant BIAW rather than the actual court file.” CP 984.

available during briefing for the motion for reconsideration. RP (7/20/07) at 30.

Clearly troubled by the idea that an agency could merely delete emails without consequence, the trial court ruled (emphasis added):

This Court did not earlier rule—as stated in your brief, [Requestor’s co-counsel]—that when an agency destroys records, regardless of the lawfulness of the destruction under a retention schedule, the PRA does not provide a cause of action. **For a court to condone that a record not produced because it was improperly deleted or otherwise destroyed in violation of the law, whether it was the Public Records Act or any other law as stated by the plaintiff, would turn the Public Records Act on its ear and destroy the purpose the public intended in enacting that law, which is to hold public servants accountable to the public.**

RP (7/20/07) at 34-35 (emphasis added).

However, the trial court stuck with its initial conclusion that the Requestor had not proven the existence of any deleted emails and dismissed the case. RP (7/20/07) at 35.

On August 7, 2007, the Agency moved for summary judgment on a retention statute (ch. 40.14 RCW) claim. CP 788. The Agency asserted that the Requestor brought a claim under ch. 40.14 RCW in addition to its PRA claim.¹¹ The Requestor disagreed, noting that the request for relief in

¹¹ See Brief in Support of Pierce County’s Renewed Motion for Summary Judgment Dismissal at 3. This pleading was not designated in the Requestor’s initial Designation of Clerk’s Paper but has been designated in a Supplemental Designation of Clerk’s Papers.

the Complaint only alleged a PRA violation. CP 799; 10-11. The Requestor observed that a month earlier, on July 30, 2007 in its motion for reconsider, the Requestor expressly stated that no private cause of action existed to enforce ch. 40.14 RCW. CP 799; 719. The trial court granted the Agency's motion for summary judgment and ruled that no ch. 40.14 RCW claim existed. CP 1076

On October 5, 2007, the Agency proceeded with its counterclaim for a "frivolous" PRA case, for naming Auditor McCarthy "personally," and for "resisting" the ch. 40.14 RCW claim (that Requestor did not make). CP 818-832. Several newspaper editors and a peace activist filed declarations describing why agency suits against public records requestors would inhibit newsgathering and other government accountability work. CP 957-958 (*Tacoma News-Tribune*); 961-962 (*The Olympian*); 959-960 (weekly newspaper); 954-956 (peace activist).

For, among other things, basing a counterclaim in part on misrepresenting the "personal" capacity facts and ignoring the controlling authority allowing the naming of these defendants, on October 26, 2007 Requestor brought a CR 11 motion against the Agency seeking \$1. CP

963-975. The trial court denied the motion on March 14, 2008.¹² CP 1125-1126.

A timely appeal of these issues followed.

IV. ARGUMENT

A. The Trial Court’s Dismissal of The Public Records Act Claim Was Improper Because the Trial Court Placed the Burden of Proof on the Requestor, Did Not Allow Discovery, Several Genuine Issues of Material Facts Existed, and the Agency Was Not Entitled to Judgment as a Matter of Law.

The standard of review for the PRA claim is *de novo*. RCW 42.56.550(3); *O'Connor v. Dep't of Social & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001) (in PRA case “the appellate court stands in same position as the trial court ...”). This gives this Court a clean slate to describe how summary judgment should proceed in a deleted email case.

To Requestor’s knowledge, this is the first deleted email case in Washington. Deleted email cases under the PRA—which involve the difficult task of proving the existence of destroyed documents—present different issues than the garden-variety PRA case in which an agency is claiming an exemption from disclosure for a paper document that a court can see and assess.

¹² The CR 11 motion was argued on November 9, 2007 but the order was not entered until March 14, 2008. The reason for the delay in entering the order is that the Agency apparently did not obtain a signed order from the trial court. This was discovered after the Notice of Appeal, which necessitated leave from the Supreme Court to have the missing order entered. *See* CP 1090-1094.

1. Legal Landscape of Deleted Email Cases.

a) The Public Records Act is interpreted in favor of disclosure.

The Court knows the importance of the public's access to public records and that the Act is interpreted in favor of disclosure. *See* RCW 42.56.030; .550(3). *See generally* Hon. C. Kenneth Grosse, ch. 2 "The Public Records Act: Legislative History and Public Policy," PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS (Wash. State Bar Assoc. 2006), ch. 2 ("Grosse") (attached as Appendix C).

b) Records retention statute.

While the PRA gets all the attention, the retention statute, ch. 40.14 RCW, is just as important. The retention statute and the PRA work in tandem, one requiring the keeping of records and the other requiring the production of records. The PRA is worthless if the requested public records are unlawfully destroyed.

Chapter 40.14 RCW authorizes the State Archivist, in conjunction with others, to adopt retention schedules requiring state agencies and local governments to retain records for varying periods of time based on their content. *See* RCW 40.14.070(1)(b). *See also* CP 200-201 (State Archivist's declaration). The Destruction of records before their retention period expires is unlawful. RCW 40.14.070(2)(a); CP 201. Specialized

retention laws govern the retention of certain records. For example, the federal Voting Rights Act, 42 U.S.C. § 1974, requires certain voter registration records to be kept for 22 months after an election with federal candidates. *See also* CP 514 (state-law retention schedule for county auditors requiring retention for 24 months of “all records generated in course of ... confirmation of voter status”).

A critical fact in email-destruction cases like this is that agency records must be retained for varying lengths of time—for example, from six years to allowing instant destruction. *See, e.g.*, CP 483; 496.

Just as critically, the retention period varies based on the content of the record. As the State Archivist’s Records Management Guidelines put it: “Basically, the contents, not the medium [i.e., email or paper record] determine the [retention] treatment of the message.” CP 585. *See also* CP 584 (describing retention of email). For example, records regarding the spending of public funds (such as accounting records) might need to be retained for six years, but records with no retention value (such as an email scheduling an employee meeting) can be destroyed instantly. CP 483; 496.

An agency employee’s email inbox almost always contains a diverse mixture of emails with contents ranging from the extremely significant to the absolutely trivial. Retention periods for each of these

emails vary accordingly. This is why automatic, indiscriminate destruction of all emails regardless of content violates retention requirements by definition—it simultaneously tosses out, for example, the six-year retainable record with the instant-delete record. As the Attorney General’s (non-binding) model rules on public records explain:

Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all e-mails after a short period of time (such as thirty days). While many of the e-mails could be destroyed when no longer needed, many others must be retained for several years. **Indiscriminate automatic deletion of all e-mails after a short period may prevent an agency from complying with its retention duties and could complicate performance of its duties under the Public Records Act.**

WAC 44-14-03005 (emphasis added) (citing *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990)).

c) ***Yacobellis* and *Prison Legal News* address the basic legal question in this case.**

Two Washington cases address the destruction of requested public records, one directly and one indirectly. A federal case addresses summary judgment aspects of a deleted-records case.

The Washington case directly addressing the issue is *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990). In *Yacobellis*, the

requestor requested records on November 26, 1986. *Id.* at 708. However, “On September 8, 1987, the City informed Yacobellis that the [requested records] had been discarded. It is *unknown* when this occurred.” *Id.* (Emphasis added). That is, the destruction of the records could have been before the request or after it; the date of destruction was “unknown.” The agency did not claim any exemptions from disclosure. *Id.* at 715. The *Yacobellis* court held “the burden of proof is on the agency to justify its failure to disclose” and noted that the agency did not establish that the records were not “public records” subject to disclosure. *Id.* at 711. For not disclosing requested non-exempt public records—because they had been destroyed either before or after the request—*Yacobellis* ruled that the agency violated the PRA. *See id.* at 715-716.¹³

The Washington case indirectly addressing destroyed public records is *Prison Legal News, Inc. v. Dep’t of Corrections*, 154 Wn.2d 628, 115 P.3d 316 (2005). This case did not involve destroyed records but rather enunciated the basic principle of the PRA: failure to provide disclosable non-exempt public records is a violation of the Act. *Prison Legal News* held, “Washington’s [PRA] requires every governmental

¹³ *Yacobellis* also addressed the “mootness” issue in a destroyed-records case, the idea that since the traditional relief in a PRA case is compelling the disclosure of records that a court cannot grant this relief in a case where the records have been destroyed. *Yacobellis* held: “Because the documents were destroyed, the court cannot grant complete relief. However, questions of costs, attorneys fees and the [daily statutory penalty] remain. The issues in this case are not moot.” 55 Wn. App. at 710.

agency to disclose any public record upon request, unless the record falls within certain specific exemptions.” *Id.* at 635.¹⁴ *Prison Legal News* does *not* hold that all non-exempt public records must be disclosed “unless the agency unlawfully destroys them first.” The Requestor asserts that the unlawful destruction of a later-requested non-exempt public record is a withholding—and therefore a violation of the principle in *Prison Legal News* that all non-exempt requested records must be disclosed.

A federal Freedom of Information Act case also sheds light on this case.¹⁵ In *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999), a requestor sought logbooks. The agency did not provide them. The agency moved for summary judgment, contending that logbooks such as the requested one were routinely destroyed after two years. *Id.* at 328. Evidence in the case allowed a reasonable inference that not all logbooks were automatically destroyed or that such destruction was unlawful. *Id.* The court held “generalized claims of destruction or non-preservation cannot sustain summary judgment.” *Id.* (citations omitted).

In our case, evidence also exists indicating that not all emails were

¹⁴ See also *Progressive Animal Welfare Soc’y. v. Univ. of Wash.*, 125 Wn.2d 243, 270, 884 P.2d 592 (1994) (“PAWS II”). (“The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request.”)

¹⁵ Citing a FOIA case in a PRA case requires an explanation of the lack of complete interchangeability between the two laws. FOIA is a weaker law than the PRA. See *Amren v. City of Kalama*, 131 Wn.2d 25,35, 929 P.2d 389 (1997) (PRA “more severe” on agencies than FOIA) (citations omitted). The holding in *Valencia-Lucena* cited in this brief concerns CR 56 and whether generalized claims of destruction create a genuine issue of material fact.

destroyed. *See, e.g., infra* at 25 (discussing Agency failure to address or prove whether intra-Agency emails are always destroyed).

d) Proving a negative: it is almost impossible for a requestor to prove the existence of deleted emails.

In a deleted email case, the main factual issue is the existence of things that have apparently been *destroyed*. The agency has all the information about how or whether it destroys its records; the requestor has none. This is why the burden of proof and ability to conduct discovery are so important in a deleted email case, and why the trial court's ruling will effectively prevent other requestors in deleted-email cases from enforcing the Public Records Act. This is why the media *amici* urged this Court to accept direct review. *See* Amicus Curiae Brief of Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, Washington State Association of Broadcasters, and Society of Environmental Journalists in Support of Direct Review at 3-4.

2. The Trial Court Erred By Effectively Placing the Burden of Proof on the Requestor.

The trial court held: “[T]here was no showing that Pierce County improperly deleted or destroyed any record in violation of the Act.” RP (7/20/07) at 35.

Most PRA cases involve exemptions from disclosure and adjudicate whether the withheld record fall within a statutory exemption

from disclosure. The burden of proof is clearly on the agency to show an exemption applies. RCW 42.56.550(1). However, there is no exemption involved in this case. CP 730; RP (9/7/07) at 36.

What happens when an agency withholds a record but does not claim an exemption? Examples of this would be when an agency destroys a requested record or silently withholds it.¹⁶ In both of these examples, Washington courts have held that the burden of proof is on the agency to justify why it withheld the record even though it did not claim an exemption. See *Yacobellis*, 55 Wn. App. at 711 (destroyed record) (“burden of proof is on the agency to justify its failure to disclose”); *Progressive Animal Welfare Soc’y. v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“*PAWS II*”) (silent withholding) (burden of proof on agency).

The Agency cited *Dragonslayer, Inc. v. Wash. State Gambling Comm’n*, 139 Wn. App. 433, 161 P.3d 428 (2007) for the proposition that a requestor must, as threshold issue, prove the requested records are “public records.” CP 186. However, *Dragonslayer* held that the burden

¹⁶ “Silent withholding” is when an agency withholds “a record or portion without [identifying] a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld.” *PAWS II*, 125 Wn.2d at 270.

of proof was on the party resisting disclosure, not the requestor. *Id.* at 441.¹⁷

3. The Trial Court Erred in Granting Summary Judgment Before the Requestor Could Conduct Discovery.

“The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” *Washington State Physicians Ins. Exchange & Ass'n v. Fisons*, 122 Wn.2d 299, 341, 858 P.2d 1054 (1993) (citation and internal quotation marks omitted).

Washington recognizes a “broad right of discovery which is subject to the relatively narrow restrictions of CR 26(c).” *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991).

This broad right of discovery is necessary to ensure [the constitutional right of access courts] to the party seeking the discovery. It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff’s claim or a defendant’s defense.

Id. This is especially true in a case centering on proving the existence of allegedly *destroyed* records.

¹⁷ *Dragonslayer* remanded the case to the trial court for a determination of whether the records were “used” by the agency—something Requestor is specifically asking this Court to do. *See Dragonslayer*, 139 Wn. App. at 445. *See also infra* at 32.

The Agency argues that when a party does not supply any factual basis for a claim it can be dismissed on summary judgment. *See* CP 78 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). However, in the case cited by the Agency, the non-moving party conducted discovery and still could not come up with a single factual dispute. *See Celotex*, 477 U.S. at 319-320 (interrogatories and depositions). In fact, *Celotex* held that the non-movant must be given a chance to conduct discovery:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322 (emphasis added).

In this PRA case, there was no “adequate time for discovery”—the Agency filed for summary judgment almost immediately, and the case had already been dismissed the same day answers to interrogatories would have been due.¹⁸

The Requestor asked for discovery numerous times in its briefing. CP 83-84; 93; 96 n.5; CP 782; 785; 787; 788. The trial court could have

¹⁸ The Agency’s motion for summary judgment was filed on June 19, 2007. CP 68. Summary judgment was granted on July 20, 2007. CP 1071. An interrogatory personally served on the Agency the day after receiving the motion for summary judgment would have been due 30 days later (CR 33(a))—which would have been July 20, 2007, the day summary judgment was granted.

denied summary judgment on July 20, 2007 to allow the conduct of discovery and could have done the same by granting the motion for reconsideration on September 7, 2007. The Requestor asked the trial court to do so. CP 93; 787.

4. The Agency Is Held to a High Standard to Obtain Summary Judgment.

As previously noted, the burden of proving it did not withhold any non-exempt requested public records is on the Agency. RCW 42.56.550(1). Summary judgment does not change which party ultimately has the burden of proof or the evidentiary standard for proving the claim. *Parry v. George H. Brown & Assocs., Inc.*, 46 Wn. App. 193, 196, n.1, 730 P.2d 95 (1986) (citation omitted).

While summary judgment might shift the burden of *production* onto a requestor to make a showing of a genuine issue of material fact, it is important to bear in mind that this is the requestor's only burden—a burden of production, not a burden of *proof*. The two are very different. *See In re Detention of Skinner*, 122 Wn. App. 620, 629, 94 P.3d 981 (2004) (analyzing difference). To prevent the mere burden of production from becoming the *de facto* burden of proof, CR 56 puts the burden of establishing entitlement to summary squarely on the movant. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992). This is

a “strict” standard. *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Devel. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

In determining whether the movant has satisfied his burden of excluding any real doubt as to the existence of any genuine issue of material fact, the movant's papers must be closely scrutinized, while those of the nonmovant should be treated with indulgence. [S]ummary judgment will be denied if there appears to be any reasonable hypothesis under which the nonmoving party may be entitled to the relief sought.

Rockey v. Western Conference of Teamsters Pension Trust, 23 Wn. App. 248, 256, 595 P.2d 557 (1979).

As will be seen below, when the Agency’s papers are “closely scrutinized” a number of “reasonable hypothes[es]” show that the Agency is not entitled to summary judgment on this record.

5. Several Genuine Issues of Material Fact Precluded Summary Judgment.

a) Whether intra-Agency emails were destroyed is a genuine issue of material fact.

The Requestor was looking for, among other things, emails among Agency staff about how they were processing the seemingly fraudulent ACORN voter registration applications. *See* CP 28 (request).

The Agency claimed that any responsive emails would have been destroyed and could not be reconstructed. *See generally* CP 69-79. The declaration the Agency relies on for this point, however, does not support

this contention—and raises the question: Were *intra-Agency* emails destroyed? The declaration of Thomas Jones, the Agency’s technology person for these matters, stated:

An email message received by the Pierce County Auditor *from an outside system* in October 2006, if deleted without being replied to or forwarded, could not be electronically or otherwise recovered by March 2007. The message deleted in October would have remained in the Pierce County recipient’s Group Wise Trash for a set period of time pursuant to policy and then deleted long before March the following. Likewise, the backup tapes for the Auditor’s Department would have been overwritten long before the March 2007 request was received.

CP 66-67 (emphasis added) (attached as Appendix A).

If the Agency’s defense is “We don’t have the records because we destroyed them so we win,” a material fact is whether some of the records actually were not destroyed. The Jones declaration by its very terms does not seem to apply to perhaps the most important records sought by the Requestor, the intra-agency emails. “Facts and reasonable inferences therefrom are viewed most favorably to the nonmoving party.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007) (citation omitted). A reasonable inference from the Jones declaration is that intra-Agency emails are not destroyed or could be reconstructed. This would be exactly what the Requestor was seeking—and what was withheld from it. Accordingly, this would make the issue of whether intra-Agency emails

were actually destroyed a “material” fact. *See Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 253, n.126, 59 P.3d 655 (2002) (“A material fact is one upon which the outcome of the litigation depends in whole or in part.”) (citations and internal quotation marks omitted).

The Jones declaration must be “closely scrutinized” (*Rockey*, 23 Wn. App. at 256) to determine whether it conclusively answers the question: what happened to intra-Agency emails? “A court should deny a motion for summary judgment if the movant's papers ... themselves demonstrate the existence of a material issue of fact.” *Cristobal v. Siegel*, 26 F.3d 1488, 1495 (9th Cir. 1994) (citation and internal quotation marks omitted). The Requestor asserts that the conspicuous limitation in the Jones declaration of only destroying emails “from an outside system” creates a genuine issue of material fact. Discovery would clarify this point.

b) Whether the Agency virtually does not use email is a genuine issue of material fact.

We live in an email world. “More than 99 percent of information is now being created electronically. ... E-mail alone represents 80 percent of discoverable communications in civil litigation.” C. Dean Little & Eric P. Blank, *Wake-Up Call on Electronic Discovery*, 61 Wash. State

Bar News 14 at *2 (July, 2007) (“Little & Blank”) (citing David K. Isom, *Electronic Discovery Primer for Judges*, 2005 Fed. Cts. L. Rev. 1; Paul R. Rice, *ELECTRONIC EVIDENCE: LAW & PRACTICE* 3 (2005)).

In this case, the Requestor noted the oddity that the Agency claimed that only one email in a five-month period existed relating to the hundreds of ACORN registrations. CP 86, 92-93, 784. Specifically, the Agency claimed that an October 23, 2006 email between Agency staff discussing how to process the ACORN registrations (CP 40) was the only email from that date until February, 2007. CP 60; 64.¹⁹ It is noteworthy that in this October, 2006 period, the Secretary of State was sending out email alerts to each county auditor office about these registrations. CP 47-49. It is also noteworthy that an email from the King County Elections Division describes a conversation between Pierce County Elections Manager Lori Aguino and an ACORN representative. CP 51. So we know that in October 2006 there was significant ACORN activity at the Agency.

The sole (pre-February, 2007) Agency email provided shows that Agency staff—like most people in the public or private sector—freely use email to communicate. *See* CP 40. The text of this email shows the informality and quick communication so common in emails:

¹⁹ As previously noted, October 2006 was the period in which hundreds of highly questionable ACORN voter registration applications were being processed.

Hi,

Dave and I just added a new source code of Mail – AC to use for the entry of [ACORN] forms when we get to that point. Does this code work for you?

Dave will touch base with you prior to starting any keying.

Dave and Mike

CP 40.²⁰

In addition to claiming that the agency only used one email in a five-month period relating to the ACORN registrations, the Agency's counsel went further, claiming that the Agency, like the Prosecutor's Office, responds to emails by walking down the hall and answering the email query in person because its "faster and easier" than hitting the reply button on an email. RP (7/20/07) at 23.²¹ If walking down the hall is so much "faster and easier," one wonders why email is such a prevalent method of communication in the modern work place. *See Little & Blank at *2* (email accounts for "80 percent of discoverable communications in civil litigation."). Once again, discovery would clarify this question. For example, a request for production of all Agency emails for a one-week

²⁰ The Requestor does not suggest that the Agency used email *exclusively* to process the ACORN voter registration applications—that colleagues sit in front of computers and never talk to each other. That would be highly unlikely. But just as highly unlikely is the claim that the Agency almost *exclusively* used non-email means of communicating about a complex topic requiring the extensive sharing of information.

²¹ Specifically, he said: "My office is the same. Someone e-mails me. I walk down the hall. I talk to them. There's no e-mail. Not because we're trying to prevent e-mails from being done; it's just faster and easier." RP 7/20/07 at 23.

period responding to other emails would show whether the Agency really uses email or instead actually responds to the barrage of email we all receive by walking down the hall.

c) Agency “generally” using email creates a genuine issue of material fact.

The Agency could not say with certainty that it did not use email for the ACORN registrations. The best they could do is to claim: “Our *general* means of communication is ‘face to face.’ *Generally speaking*, if an issue arises, I call on staff to meet directly” CP 60; 64-65 (emphasis added). A declaration about a “general” practice does not establish whether that practice occurred in a given case. Instead, “general” practice evidence creates a genuine issue of material fact as to whether the practice actually happened in the case. *See Rowley v. American Airlines*, 885 F. Supp. 1406, 1413-1414 (D. Ore. 1995) (airline employees’ declarations regarding customary practices of airline created a genuine issue of material fact precluding summary judgment to disabled passenger who alleged she was left unattended and immobile for more than 30 minutes in violation of federal regulation while airline unloaded her scooter; passenger was entitled to discovery to impeach airline’s practice evidence).

- d) **Just one email in five months relating to the processing of hundreds of apparently fraudulent voter registration applications is a genuine issue of material fact.**

As noted above, the Agency states that it conducts business “generally” by meeting face-to-face and claims to often reply to emails by walking down the hall. Because it claimed that it virtually does not use email, the Agency asserted that only one responsive email existed during the five-month period from October 2006 to February 2007.

Contrast this claim with the one example of a (pre-February, 2007) Agency email (CP 40). In the email, the Agency is using email to discuss how to process ACORN applications: “Dave and I just added a new source code of Mail – AC to use for the entry of [ACORN] forms when we get to that point. Does this code work for you?” CP 40.

Summary judgment is only allowed “where it is quite clear what the truth is[.]” *Burback v. Bucher*, 56 Wn.2d 875, 877, 355 P.2d 981 (1960). Is this Court, which reviews this case *de novo*, convinced that the clear truth is that the Pierce County Auditors office used one email in five months to communicate about the registration of hundreds of seemingly fraudulent voter registration applications? Refuting or verifying this claim could be accomplished with discovery. *See* RP (9/7/07) at 7 (Requestor’s co-counsel: “One email in five months. We would like to test that

assertion via discovery.”). The question of whether the Agency disclosed only one of many responsive emails—thereby silently withholding the remaining ones—is certainly a material fact. *See PAWS II*, 125 Wn.2d at 270 (“The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request.”).

e) Whether the Agency “used” email in the ACORN registration process is a genuine issue of material fact.

Since one way for a record to be a “public record” is if the agency “used” it (RCW 42.56.010(2)), the Agency adamantly maintained that it did not “use” email (other than the one provided) to process ACORN registrations. CP 193. Because one of the Agency’s primary defenses was that it did not “use” virtually any email—and evidence exists that it did use email (CP 40)—the question of whether it actually did is a genuine issue of material fact.

f) Deleting the in boxes is a genuine issue of material fact.

The Agency acknowledged that it had failed to provide the two Secretary of State emails and, after a “further scrubbing of all emails and files,” found 38 additional pages of public records, including many emails.

CP 37.²² According to the Agency, the newly provided emails had been deleted from staff “in boxes” but were discovered in their “sent boxes.”

Id. This raises two issues. First, was the Agency violating retention laws when staff were deleting emails from their in boxes—some of which were responsive to the request? Second, some of the newly provided emails from the sent boxes were sent to Agency employees who should have provided them in response to the request but did not. *See* CP 85, n.3. This shows that some responsive emails were not provided. A reasonable inference from the fact that several people received emails is that some people replied to them. “[R]easonable inferences are considered in a light most favorable to the nonmoving party[.]” *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005) (citation omitted). This would mean replies were not provided to the Requestor. Any replies from the multiple people receiving the emails is exactly what the Requestor seeks—this is the essence of the request, showing how the Agency was processing the voter registration applications. Accordingly, whether replies exist and were not provided is a genuine issue of material fact.

²² These later-discovered emails were created after February, 2007. That is, there still was only one email from the five-month period from October, 2006 to February, 2007, but there were a handful more from after February, 2007.

g) The Agency's retention policies and practices are a genuine issue of material fact.

The lawfulness or unlawfulness of destroying records is a material issue in this case. It was a basis for the trial court's ruling. RP (9/7/07 at 31; 34-35). The question of how the Agency retains or destroys records in general would shed light on the issue of whether the requested emails were lawfully or unlawfully destroyed. Knowing if the emails are retained by another part of the county might allow them to be obtained from there. The Requestor specifically asked to conduct this kind of discovery. *See* CP 788. In general, "A technically skilled person can quickly find evidence of failures to preserve evidence." Little & Blank, at *3.

h) Whether the Agency violated the federal Voting Rights Act's retention requirements is a genuine issue of material fact.

The records retention provision of the Voting Rights Act, 42 U.S.C. § 1974, requires a local elections office to retain for 22 months "all records and papers ... relating to any application, registration ... or other act requisite to voting." The scope of records required to be retained is broad. *See Kennedy v. Lynd*, 306 F.2d 222, 230 (5th Cir. 1962) (in requirement for "all" records to be retained "All means all."). *See also McIntyre v. Morgan*, 624 F. Supp. 658, 664 (S.D. Ind. 1985) (describing scope of retention requirement).

A reasonable inference from the Agency's defense in this case—that it destroys emails including election-related ones—is that some of the emails or their attachments were voter registration records protected by the Voting Rights Act. Knowing at least the rough contents of what was destroyed would clarify whether the Agency thereby violated the Voting Rights Act's retention requirements. Knowing whether a Washington elections office is violating the Voting Rights Act is worth a remand to the trial court to conduct discovery.

i) The existence of the Secretary of State emails creates a genuine issue of material fact.

The Requestor obtained two Secretary of State emails as *examples* of responsive records not provided by the Agency. They were only examples. The Agency acknowledged that it destroyed their copies of the Secretary of State emails. CP 61; 64-65.

The existence of responsive—but deleted—emails leads to the reasonable inference that there are more because the Agency's retention and public records production system is not operating as the law requires. This, in turn, informs the conclusion of whether the Agency unlawfully deleted other responsive emails. The existence of the two responsive—but withheld—Secretary of State emails creates a genuine issue of material fact of whether there are more.

j) Agency says requested emails were “more probably than not” deleted so whether they were actually deleted is a genuine issue of material fact.

The Agency’s own declarations say any requested emails “more probably than not” were deleted the same month received. CP 61; 64-65. More probably than not? Were they *actually* deleted? The Agency’s defense in this case is that it deleted the emails so they are not are not “public records” subject to disclosure. *See, e.g.,* RP (7/20/07) at 20 (“*Ipsa facto*, they are not public records.”). The Agency’s own declaration makes the question of whether responsive emails were *actually* deleted a genuine issue of material. “[G]eneralized claims of destruction or non-preservation cannot sustain summary judgment.” *Valencia-Lucena*, 180 F.3d at 328 (citations omitted).

k) Whether forensic recovery of the emails is feasible is a genuine issue of material fact.

The Agency asserts that it cannot recover emails from the time period in question because the backup tapes have been overwritten. CP 66-67 (attached as Appendix A). Whether the Agency or an expert could have recovered the emails is a genuine issue of material fact—it means the Agency could have provided requested emails but instead withheld them. The Requestor specifically sought discovery on this point. CP 788.

6. The agency is not entitled to judgment as a matter of law.

The trial court did not directly address the issue of entitlement to judgment as a matter of law. However, this Court reviews the case *de novo* so the Requestor will brief the reasons why the Agency is not entitled to judgment as a matter of law.

a) The Agency’s argument is at odds with the PRA.

RCW 42.56.030 directs courts to liberally construe the PRA in favor of disclosure. *See generally* Grosse (Appendix C). Accordingly, “The mandate of liberal construction [in the PRA] requires the court to view with caution any interpretation of the statute that would frustrate its purpose” *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 693, 937 P.2d 1176 (1997). Interpreting the PRA to allow the unlawful destruction of later-requested non-exempt emails would, to put it mildly, frustrate the purpose of the Act.

Two statutes are at issue here: (1) ch. 40.14 RCW, the retention statute, requiring the retention of certain records, and (2) ch. 42.56 RCW, the Public Records Act, requiring the disclosure of certain records. The two statutes operate together. Therefore, to interpret ch. 42.56, the Court should consider ch. 40.14. *See In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004) (“Statutes relating to the same subject are construed together and, in ascertaining legislative purpose ... are to be read together

as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves.”) (citations and internal quotation marks omitted; ellipsis in original). Considering ch. 40.14 RCW and ch. 42.56 together as a “harmonious, total statutory scheme” means that certain records must be retained and disclosed. Accordingly, a disclosure statute is useless if the retention statute requiring the disclosable records to be kept in the first place can be easily avoided by deleting the records without consequence. To interpret the disclosure statute to mean that violating the retention statute has no consequence—and thus rendering the disclosure statute inoperable—would render the retention statute useless. It would also create an incentive for agencies to unlawfully destroy embarrassing records.

b) The PRA’s venue provision does not authorize the unlawful destruction of public records.

The Agency pointed to RCW 42.56.550(1) as a reason why it was entitled to judgment as a matter of law. CP 193. This statute provides in relevant part: “the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying[.]” Then the Agency argued that since an action is proper in the Superior Court in which the records is “maintained” that no cause of action exists when the agency destroys the

record first. *Id.* The portion of RCW 42.56.550(1) pointed to by the Agency is merely a venue statute. A statute providing that “the superior court in the county in which a record is maintained” may require a show cause proceeding would be an odd way to word a law that actually meant an agency escapes PRA liability by unlawfully destroying records before the public can request them. Furthermore, if this venue provision authorizes the unlawful destruction of public records then *Yacobellis* was wrongly decided because the destroyed records in that case were not “maintained” at the time of the suit.

c) Destruction does not “ipso facto” mean they are no longer “public records.”

The Act defines a public record as any “writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(2).²³ The Agency argued that it did not “possess”²⁴ “retain” or even “use” emails relating to the processing of

²³ The definition of “public record” is interpreted broadly. *Ames v. City of Fircrest*, 71 Wn. App.284, 291, 857 P.2d 1083 (1993). The definition of “public record” is in the disjunctive—a writing can be either “prepared” or “owned” or “used” or “retained.” *See Concerned Ratepayers v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999).

²⁴ “Possess” is not in the definition of “public record,” but the Agency repeatedly argued that since it did not “possess” the records they were not “public records.” *See, e.g.*, CP 72; RP (9/7/07) at 11.

ACORN voter registration applications because it destroyed them. CP 774-776.

All agency emails written by agency staff were “prepared” by the agency. Presumably, all agency emails are “owned” by the agency. Many emails coming into an agency staff member are considered, replied to, or forwarded and hence are “used” by the agency.²⁵ Possession of a record is not required for it to be “used” under the PRA and hence a “public record.”²⁶

d) *Yacobellis and Prison Legal News* preclude judgment for the Agency as a matter of law.

For the reasons previously briefed (*supra* at 17), *Yacobellis* and *Prison Legal News* preclude judgment for the Agency as a matter of law.

B. An Elected Official in His or Her Official Capacity Is a Proper Defendant in a PRA Case.

As described above, the Requestor named as a defendant, “Pat McCarthy, in her official capacity as Pierce County Auditor.” The Agency argued that Auditor McCarthy had been sued “personally.” The Requestor cited numerous authority to the trial court in which a PRA suit

²⁵ The definition of “used” in the PRA is very broad. See *Concerned Ratepayers v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999) (record “used” if information in it “bears a nexus with the agency’s decision-making process”).

²⁶ See *Concerned Ratepayers*, 138 Wn.2d at 960 (“regardless of whether an agency ever possessed the requested information, an agency may have ‘used’ the information within the meaning of the [PRA.]”). This directly contradicts the Agency’s “ipso facto” argument.

proceeded against an agency official in his or her official capacity. *See* CP 967-968.²⁷ The trial court dismissed Auditor McCarthy as a defendant.

Based on the authority cited to the trial court, the suit against Auditor McCarthy in her official capacity was authorized and the trial court erred by dismissing her as a defendant. *See supra*, note 27.

This decision is reviewed *de novo* by this Court. RCW 42.56.550(3); *O'Connor v. Dep't of Social & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001) (in PRA case “the appellate court stands in same position as the trial court”).

C. Granting Summary Judgment on a Claim No Party Made was Improper.

The Requestor filed a complaint alleging a violation of the PRA. *See* CP 10. To describe the interplay between ch. 40.14 RCW and the PRA, the Requestor stated that the destruction of the emails was unlawful. *See* CP 731.

²⁷ The authority cited to the trial court in CP 967-968 was: *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978); *Moser v. Kanekoa*, 49 Wn. App. 529, 744 P.2d 364 (1987); *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000); *Evergreen Freedom Fdn. v. Locke*, 127 Wn. App. 243, 110 P.3d 858 (2005); *Limstrom v. Ladenburg*, 85 Wn. App. 524, 933 P.2d 1005 (1997), *rev'd on other grounds*, 136 Wn.2d 595, 963 P.2d 869 (1998); *Limstrom v. Ladenburg*, 98 Wn. App. 612, 989 P.2d 1257 (1999); *Limstrom v. Ladenburg*, 110 Wn. App. 133, 39 P.3d 351 (2002). In addition, the Requestor cited a treatise: PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS (Wash. State Bar Assoc. 2006) § 3.1(1) (“The PRA has been applied to individual municipal officers acting in their official capacities.”) (citations omitted).

The Agency argued that the Requestor was bringing a claim under ch. 40.14 RCW.²⁸ The Requestor expressly stated that it was not bringing such a claim and that no private cause of action existed under the retention statute. CP 719. In fact, the Agency *admitted* that the “complaint’s ‘request for relief’ seeks nothing under RCW 40.14 *et seq.*” CP 77. Nonetheless, the Agency moved for summary judgment on a ch. 40.14 claim no one made. The Requestor, while agreeing that no private cause of action existed, resisted summary judgment out of concern that the Agency was attempting to be the “prevailing party” (on a claim no one made) to reduce an eventual attorneys fee award to the Requestor under the PRA. *See* RP(9/7/07) at 27.

The trial court’s ultimate conclusion—that no private cause of action existed under ch. 40.14—was not error, but granting summary judgment on a claim no one made was. It was an advisory opinion.²⁹ This Court reviews the trial court’s decision to grant summary judgment de novo. *See Mutual of Enumclaw Ins. Co. v. Dan Paulson Const. Inc.*, 161 Wn.2d 903, 914, 169 P.3d 1 (2007) (citations omitted).

D. An Email Produced to the Requestor Under the Public Records Act and Not Claimed to be Exempt From

²⁸ *See* Brief in Support of Pierce County’s Renewed Motion for Summary Judgment Dismissal at 3. This pleading has been designated in a Supplemental Designation of Clerk’s Papers. *See supra*, note 11.

²⁹ Advisory opinions are, of course, improper. *See Walker v. Munro*, 124 Wn.2d 402, 411-412, 879 P.2d 920 (1994).

Disclosure Under “Attorney Client Privilege” is Not Privileged and Inadmissible.

The trial court granted the Agency’s motion to strike as inadmissible an email provided to the Requestor in response to a public records request; the Agency claimed attorney-client privilege for 134 documents in that records request, but not for this one. CP 1082. In the email, the Agency’s counsel “allegedly” (more on that below) reports to the county it won the motion for summary judgment and that with the Agency’s pending counterclaim against the Requestor, “We’ll see if we can get the County some money” CP 982. The “privileged” email also says, “Good luck for ‘your’ baseball team’s success!” *Id.* In denying the Agency’s motion to seal the email, the trial court ruled that the email “is, at best, innocuous and at worst, embarrassing[.]” CP 1066. The Agency argued that the email was attorney-client privileged under RCW 5.60.060(2) and work product, it was inadvertently disclosed to the Requestor, and the Requestor’s attorneys reasonably knew the document was privileged and had been inadvertently disclosed.

1. The Email Was Not Privileged.

The Agency must first prove that the email was privileged. *See Dietz v. Doe*, 131 Wn.2d 835, 844 935 P.2d 611 (1997) (burden on party claiming attorney-client privilege). It must next prove it was inadvertently disclosed. And it must finally prove that the Requestor’s attorneys

reasonably knew the document was privileged and that the County did not intend to disclose the record. The Agency cannot meet these burdens.

First, the email is not privileged. The attorney client privilege is a “narrow privilege” and only extends to documents containing a privileged communication. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004). For a communication from a client to be protected, there must be a belief by the client that he or she is consulting a lawyer in his or her legal capacity and is seeking professional legal advice. *Heidebrink v. Moriwaki*, 38 Wn. App. 388, 394, 685 P.2d 1109, *rev’d on other grounds*, 104 Wn.2d 392, 706 P.2d 212 (1984). When the communication is a communication from the attorney, the communication must (1) be transmitted in confidence, (2) from the attorney—serving in the capacity of legal advisor, (3) to a client, (4) actually conveying legal advice, and (5) it must be maintained in confidence. *Ramsey v. Mading*, 36 Wn.2d 303, 311-312, 217 P.2d 1041 (1950); *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981). When the client is an entity such as a government agency, the privilege only extends to communications between the attorney and representative of the entity authorized to act or speak for the organization in relation to the subject matter of the communication. *See Scott Paper Co. v. United States*, 943 F. Supp. 489, 499 (E.D. Pa. 1996).

Where a communication is made in the presence of a third person or circulated to others, the confidential nature of the communication has been waived and the privilege is not available. *Ramsey*, 36 Wn.2d at 311-312. Waiver of the attorney-client privilege may occur when a communication is made in the presence of third persons on the theory that such circumstances are inconsistent with the notion that communication was ever intended to be confidential. *Dietz*, 131 Wn.2d at 852. Selective disclosure of a communication may waive the attorney-client privilege as to all related portions of the communication, particularly if selective disclosure is used to gain tactical litigation advantage. *Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 739, 812 P.2d 488 (1991).

Communications which do not convey legal advice, but simply convey information or business or political advice, for example, are not privileged. *Kammerer*, 96 Wn.2d at 421. In *Kammerer*, for example, the Court of Appeals ruled that a memorandum of a conference between a corporate client and its lawyer was not privileged because the communication transmitted generic information (business advice) but not legal advice.

The email at issue here reported facts which at the time were a matter of public record: that the trial court had denied a motion, granted a

motion, that a counterclaim remained, and that the judge's husband had worked with Requestor's co-counsel at one time. These facts were disclosed in open court proceedings. None of these statements were secrets or conveyed legal advice.³⁰

The Agency has not shown that all individuals who received the communication were a representative of the county authorized to act or speak for the county in relation to the subject matter of the communication, and that the communication was maintained in confidence and not shared with anyone outside of this narrow client-agent subgroup. *See Scott Paper Co.*, 943 F. Supp. at 499.³¹

2. The Email Was Not Work Product.

For the same reasons described above, the email was not "work product." Work product "includes factual information collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions, and conclusion." *Limstrom v. Ladenburg*, 136 Wn.2d 595, 606, 963 P.2d 869 (1998). The email reported already-known facts, not facts

³⁰ The second paragraph of the email ("We'll see if we can get the County some money for my time anyway") did not convey legal advice. It merely repeated the Agency's already well known desire to seek money from the Requestor. After all, months before the email was written, the Agency filed a court pleading making the counterclaim. *See* CP 56. The final paragraph ("P.S. Good luck for 'your' baseball team's success!") similarly conveyed no legal advice.

³¹ The question of who received the email is a real one. For example, the original email was not sent to Denise Greer. *See* CP 982. However, she responds to it (*id.*), thus indicating that either the original recipients forwarded the email to others or that it was blind copied (or both). Who else received the email? Were they "clients" or not? The Agency must show all the persons who received the email, something it has not done.

gathered by an attorney or an attorney's research. The email was not the key to the Agency's legal strategy and did not even discuss anything not already known. It was simply an email saying "we won." This is probably why the trial court held that the email "is, at best, innocuous and at worst, embarrassing[.]" CP 1066.

3. The Requestor Could Not Reasonably Have Thought the Email was Inadvertently Disclosed.

The Agency produced the email to the Requestor in response to a separate Public Records Act request. The Agency provided 1,724 pages of records in response to that request. CP 1019. The Agency withheld 134 records on attorney client privilege and work product grounds. *Id.* Seeing that the Agency had examined 1,724 pages of documents and determined 134 separate times that a document was believed to be privileged, it was very reasonable to conclude that any disclosed records had gone through this process and were determined by the Agency to be non-privileged. The Agency knew how to claim privilege—and did so 134 times—so when it did not try to claim privilege for the email, it was reasonable to conclude that the Agency did not believe the email was privileged. Moreover, the emails reported already-known information and contained absolutely no legal advice. Because it did not appear to be

privileged, and because it was provided when 134 other documents were withheld, the Requestor reasonably concluded that it was not privileged.

The standard of review for this issue is abuse of discretion.

Thompson v. Hanson, 142 Wn. App. 53, 64, 174 P.3d 120 (2007).

E. The Trial Court Erred in Denying the Requestor's CR 11 Motion Seeking \$1 in Sanctions When the Agency's Counsel, Inter Alia, Misrepresented Facts and Law to the Court and Then Based a Counterclaim in Part on Those Misrepresentations.

The Agency filed a counterclaim against the Requestor for filing a "frivolous" PRA case. CP 56. The Agency moved for summary judgment on its counterclaim alleging that the PRA case was frivolous (because the agency had destroyed the records and "ipso facto" defeated a PRA claim), that the Requestor had named Auditor McCarthy in her "personal" capacity (which was not correct), and that the Requestor had "resisted" summary judgment on a ch. 40.14 RCW claim (that no one had made). CP 818-831. The Agency's counterclaim was, itself, frivolous so the Requestor filed a CR 11 motion and sought a \$1 sanction. *See* CP 963-975. Among other things, the Requestor alleged that the Agency's counsel had lost his professional judgment by, for example, writing an angry letter to the editor (CP 984) about a pending case. CP 973.

The best description of the basis for a CR 11 is contained in the memorandum of law in support of that motion. *See* CP 963-975. All the grounds for the CR 11 motion will not be repeated here.

This Court reviews the trial court's denial of the motion under the abuse of discretion standard. *Parry v. Windemere Real Estate/East, Inc.*, 102 Wn. App. 920, 930, 10 P.3d 506 (2000).

F. The Requestor is Entitled to Attorneys Fees and Costs on Appeal.

Pursuant to RAP 18.1(a), the Requestor requests reasonable attorneys fees and costs on appeal. The authority for this request is RCW 42.56.550(4).³²

V. CONCLUSION

The Public Records Act is meaningless if an agency can unlawfully delete emails and, as a reward, escape liability under the Act. Unlawful destruction is withholding. It is the ultimate withholding. Requestor asks the Court to reverse the trial court's grant of summary judgment and the other appealed orders to allow the Requestor to conduct discovery and try its case.

Respectfully submitted this 20th day of June, 2008.

³² *See also* *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 304, 825 P.2d 324 (1992) ("*Yacobellis II*") (RCW 42.56.550(4) "has been specifically construed as permitting the prevailing party to receive attorney fees on appeal.") (citing *PAWS II*, 125 Wn.2d at 271).

By: Greg Overstreet

Greg Overstreet, WSBA #26682

Allied Law Group

1110 S. Capitol Way, Suite 225

Olympia, WA 98501

(360) 753-7510

Attorneys for Appellant



CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on June 20, 2008, I caused the delivery by U.S. mail of a copy of Petitioner's Opening Brief to:

Daniel R. Hamilton
Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
(Attorney for Respondent/Cross-Petitioner)

Katherine George
Law Office of Charlotte Cassady
15532 Southeast 25th Street
Bellevue, WA 98007
(Attorney for Media Amici)

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 JUN 20 P 4: 53
BY RONALD R. CARPENTER
CLERK

Dated this 20th day of June, 2008, at Olympia, Washington.


Greg Overstreet, WSBA # 26628

Appendix A

EXPEDITE
 No hearing set
 Hearing is set:
 Date: 7/20/07
 Time: 9am
 Judge/Calendar: Hirsch
Motion

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 IN AND FOR THE COUNTY OF THURSTON

BUILDING INDUSTRY ASSOCIATION OF
 WASHINGTON, a Washington not-for-profit
 corporation,

Plaintiff,

NO. 07-2-01058-8

vs.

PAT McCARTHY, in her official capacity as
 Pierce County Auditor, PIERCE COUNTY,
 Washington, a Municipal Corporation,

AFFIDAVIT OF THOMAS JONES

Defendants.

I, Thomas Jones, am over the age of 18, am competent to testify to this matter, and
 make this declaration based on personal knowledge.

1. I am an Information Technology Specialist for the Pierce County Information
 Technology Department and in charge of its litigation and investigation related assistance.

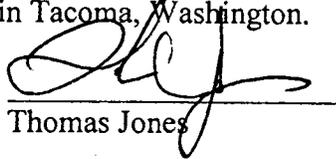
2. An email message received by the Pierce County Auditor from an outside
 system in October 2006, if deleted without being replied to or forwarded, could not be
 electronically or otherwise recovered by March of 2007. The message deleted in October
 would have remained in the Pierce County recipient's GroupWise Trash for a set period of

COPY

1 time pursuant to policy and then deleted long before March the following. Likewise, the
2 backup tapes for the Auditor's Department would also have been overwritten long before the
3 March 2007 request was received.

4 I certify under penalty of perjury under the laws of the State of Washington that the
5 following is true and correct.
6

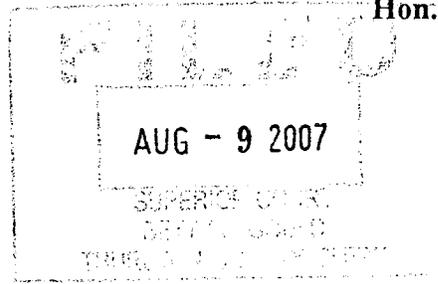
7 Signed this __ day of June, 2007 in Tacoma, Washington.

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Thomas Jones

Appendix B

EXPEDITE
 No hearing set
 Hearing is set
Date: _____
Time: _____
Judge/Calendar: Hirsch/Motion

Hon. Anne Hirsch



**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY**

BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON, a Washington not-for-profit
corporation,

Plaintiffs,

vs.

PIERCE COUNTY, Washington, a Municipal
Corporation.

Defendants.

No. 07-2-01058-8

**DECLARATION OF
WASHINGTON STATE AUDITOR
BRIAN SONNTAG**

Brian Sonntag declares as follows:

1. I am the Auditor of the State of Washington.
2. The Washington State Constitution, art. III, § 20, establishes the office of the State Auditor. RCW 43.09.020 provides: "The auditor shall be auditor of public accounts, and shall have such powers and perform such duties in connection therewith as may be prescribed by law."
3. RCW 43.09.245 provides: "The state auditor has the power to examine all the financial affairs of every local government and its officers and employees."



1 4. In performing its audits, the State Auditor's Office relies on documents in all forms –
2 paper and electronic – to do its work. For example, we routinely examine the minutes of
3 public meetings, review government financial records and government contracts, and look at
4 e-mails. In the order to conduct audits, the Auditor may need to review every type of
5 document a government prepares, owns, uses or retains.

6 5. These documents are critical to our work, and therefore, it is vital that they be retained
7 in accordance with state law and with the state records retention schedule.

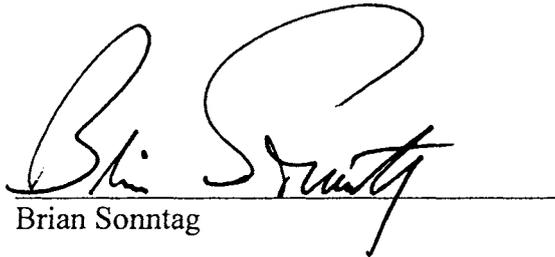
8
9 6. Our work would become difficult, and in some cases impossible, if records were
10 destroyed in violation of retention schedules. Inadequate record retention by agencies would
11 impact the State Auditor's ability to report to federal grantors, state policy-makers, state and
12 local government officials and citizens on local government and state agencies' financial
13 health and compliance with state law.

14 7. Additionally, destruction of records would substantially hinder our fraud and
15 whistleblower investigations. The State Employee Whistleblower Act (RCW 42.40.040(9)(c))
16 states: "Agencies shall cooperate fully in the investigation and shall take appropriate action to
17 preclude the destruction of any evidence during the course of the investigation."

18 I declare under penalty of perjury that the foregoing is true and correct.

19 DATED this 8th day of August, 2007.

20 Respectfully submitted,

21
22 
23 Brian Sonntag

Appendix C

CHAPTER 2

THE PUBLIC RECORDS ACT: LEGISLATIVE HISTORY AND PUBLIC POLICY

Hon. C. Kenneth Grosse

Summary

- §2.1 Legislative History
- §2.2 Public Policy
 - (1) Statements of Public Policy in the PRA
 - (2) Purpose for Adopting PRA
 - (3) Cases Describing Public Policy of PRA

§2.1 LEGISLATIVE HISTORY

To accurately understand the Public Records Act (PRA), it is necessary to return to the circumstances surrounding its creation.

Ken Grosse is a native of the Pacific Northwest. He received his Bachelor's of Arts from the University of Washington in 1966 and his Juris Doctorate from the University of Washington School of Law in 1968 and was Projects Editor of the Law Review. He served as a law clerk to Washington State Supreme Court Justice Frank P. Weaver. From 1969 to 1972 he served as an assistant attorney general. In 1972 he entered private practice and in 1983 he joined former Governor Spellman as his counsel and subsequently as chief of staff. He was appointed to Division One of the Washington State Court of Appeals in January 1985, and is currently serving his third six-year term. He has twice been Presiding Chief Judge of the full Court of Appeals and was Chief Judge of Division One. Since joining the Court, he has served on numerous boards and commissions, including the Judicial Council, the Washington Courts 2000 Commission, the Board for Judicial Administration, Co-chair of the Commission on Justice, Efficiency and Accountability, and since 1986, Vice Chair of the Judicial Information System Committee overseeing the operations of the judiciary's computer-based information system, as well as Chair of the Data Dissemination Committee, developing and administering the judiciary's policy insuring public access to judicial information while safeguarding the legitimate concerns for privacy on the part of our citizens.

The author wishes to thank Jason W. Crowell of Stoeel River for his assistance with the research for this chapter.

§2.1 / Legislative History & Public Policy

The year is 1972. Watergate is unfolding. Popular distrust of government—especially government secrecy—is at an all-time high. The federal government recently enacted its landmark Freedom of Information Act. See generally chapter 19, Introduction to the Federal Freedom of Information Act (FOIA).

A group of Washington citizens, the Coalition for Open Government, drafts an initiative to bring open government to Washington state. Initiative 276 is the product. It passes with a comfortable 72.01 percent margin and Washington's Public Records Act is born.

Originally, the Public Records Act had two parts: (1) campaign finance and lobbying disclosures, and (2) public records. This deskbook analyzes only the public records portion of the Act. However, effective July 1, 2006, the public records portion of the Act was recodified on its own and was placed in Chapter 42.56 RCW. See Laws of 2005, ch. 274.

The validity of the PRA was challenged soon after its passage in the landmark 1974 case *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974). In *Fritz*, the court reflects on the history of the initiative process, which was born of popular dissatisfaction with the unresponsiveness of government through the traditional channels, and observes that this same dissatisfaction led to the enactment of Initiative 276:

It has been said time and again in our history by political and other observers that an informed and active electorate is an essential ingredient, if not the *Sine qua non* in regard to a socially effective and desirable continuation of our democratic form of representative government. There certainly have been more obstacles in the past to the realization of an informed, active, and participating electorate than at the present time. With the advent of television and its technically proficient development today, and with dramatic improvements in our other modes of dissemination of information about government to the public, the dream and the faith of our founding fathers in an informed, active and participating electorate comes closer to realization today than at any other time in our history.

With improved means and methods of communication there is little reason to doubt that a substantial percentage of the public is better informed, more alert, interested, and, in fact, concerned today with matters of government than ever before in our history. We can note particularly that in recent years there has been more dissemination to the public of information.... There has been an increasing emphasis on the importance of the role of money, funds, and finances in regard to the aforementioned matters. There has been much emphasis on the importance of the availability of public information, public records, the right of the public to know. As a culmination of public interest and concern along the lines indicated, and

Legislative History & Public Policy / §2.2(1)

due to the availability of the initiative process in our state, the electorate adopted Initiative 276 at the election in 1972 by a substantial majority of the votes cast.

Fritz, 83 Wn.2d at 283-84. For additional discussion of I-296 and the history of the PRA, see *Amren v. City of Kalama*, 131 Wn.2d 25, 30-31, 929 P.2d 389 (1997).

Citing to the *Fritz* opinion's recognition of the initiative process as a role for the people akin to a fourth branch of government, a 1975 Gonzaga Law Review article states:

Indeed, the Fourth Branch of government, the people, has spoken [in the PRA]: Any person has the *right* to inspect and copy *all* public records—which includes any writing regardless of physical form or characteristics...—unless it would unreasonably disrupt the operations of the agency, or the record specifically is exempt from disclosure. Other states have passed similar enactments and, like Washington, have used federal law, specifically the Freedom of Information act, as a model.

Michael C. McClintock, Steven A. Crumb, & F. Douglas Tuffley, *Washington's New Public Records Disclosure Act: Freedom of Information in Municipal Labor Law*, 11 GONZ. L. REV. 13, 16-17 (1975) (citations omitted).

The underlying guiding spirit of the PRA's genesis has served as the framework for the judiciary's application and interpretation of its provisions.

§2.2 PUBLIC POLICY

(1) Statements of public policy in the PRA

The PRA contains express provisions as to its purpose and policy:

- “It is hereby declared by the sovereign people to be the public policy of the state of Washington... That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, 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.... The provisions of [the PRA] shall be *liberally construed* to promote ... full access to public records so as to assure continuing public confidence of fairness of... governmental processes, and so as to assure that the public interest will be fully protected.” RCW 42.17.010 (emphasis added).

§2.2(2) / Legislative History & Public Policy

- “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. T[he PRA] shall be *liberally construed* and its *exemptions narrowly construed* to promote this public policy.” RCW 42.17.251/**RCW 42.56.030** (emphasis added).
- “The provisions of this act are to be *liberally construed* to effectuate the policies and purposes of this act. In the event of conflict between the provisions of this act and any other act, the provisions of this act shall govern.” RCW 42.17.920 (emphasis added).

It is noteworthy that the Act specifies *three* times that courts must construe it liberally in favor of disclosure. See *King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the “thrice-repeated” mandate of interpreting the Act in favor of disclosure). Virtually no other legislation repeats three times how it should be interpreted. Courts should never ignore this “thrice-repeated” demand.

(2) Purpose for adopting PRA

When interpreting an initiative, courts will look to the official voters pamphlet to determine the purpose of an act. The 1972 voters pamphlet on the PRA makes clear that the initiative:

[W]as partially intended to change the common law rule that a citizen could examine public records “required by law to be maintained” only if he or she could show a “legitimate interest”; and further, that examination of all other public records was “within the discretion of [the] official” having custody of the records. As explained by the voters pamphlet: “The initiative would require all such ‘public records’ of both state and local agencies to be made available for public inspection and copying by any person asking to see or copy a particular record....”

Michael C. McClintock, Steven A. Crumb, & F. Douglas Tuffley, *Washington’s New Public Records Disclosure Act: Freedom of Information in Municipal Labor Law*, 11 GONZ. L. REV. at 25-26 (citations and footnotes omitted).

Explanatory statements and arguments in the official voters pamphlet are tantamount to legislative history and can be used as an aid to construction. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 140 Wn.2d 615, 637, 999 P.2d 602 (2000); see also *Hearst*

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Corp. v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978) (quoting I-296 voters pamphlet). The statement “for” Initiative Measure 276 expressly provided that the law “‘makes all public records and documents in state and local agencies available for public inspection and copying’ except those exempted to protect individual privacy and to safeguard essential governmental functions.” *Hearst Corp.*, 90 Wn.2d at 128.

(3) Cases describing public policy of PRA

The Supreme Court has described the public policy of the PRA in extremely strong terms:

The stated purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as the [PRA], government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”

Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS II), 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (citations and footnotes omitted).

Several other cases discuss the public policy of the PRA:

- The purpose of the PRA is “to provide full access to non-exempt public records.” *Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503 (ACLU I)*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997).
- The PRA’s “primary purpose is to promote broad disclosure of public records.” *Yacobellis v. City of Bellingham (Yacobellis II)*, 64 Wn. App. 295, 301, 825 P.2d 324 (1992).
- “Access is the underlying theme of the act.” *ACLU I*, 86 Wn. App. at 696.
- The Act “is a strongly worded mandate for broad disclosure of public records.” *PAWS II*, 125 Wn.2d at 251 (quoting *Hearst Corp.*, 90 Wn.2d at 127); *see also Amren*, 131 Wn.2d at 31.
- “The purpose of the [PRA] is to keep public officials and institutions accountable to the people.” *Daines v. Spokane County*, 111 Wn. App. 342, 347, 44 P.3d 909 (2002).

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- “The [PRA] reflects the belief that the public should have full access to information concerning the working of the government.” *Newman v. King County*, 133 Wn.2d 565, 570, 947 P.2d 712 (1997).
- “The [PRA] enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government’s activities.” *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2004).
- “The public policy behind the act is clearly based on the public’s right to the full disclosure of public documents.” *Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503 (ACLU II)*, 95 Wn. App. 106, 111, 975 P.2d 536 (1999).
- The PRA was “designed to provide open access to governmental activities.” *Amren*, 131 Wn.2d at 31.
- The public policy of the PRA “favors disclosure.” *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 793, 791 P.2d 526 (1990); *see also Prison Legal News, Inc. v. Dep’t of Corr.*, 154 Wn.2d 628, 645, 115 P.3d 316 (2005) (otherwise private health care information must be disclosed after personal identifying information redacted).
- “[P]ermitting a liberal recovery of costs [in PRA enforcement actions] is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public’s right to access to public records.” *ACLU II*, 95 Wn. App. at 115.
- The purpose of the PRA is “nothing less than the preservation of the most central tenets of the representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” *PAWS II*, 125 Wn.2d at 251; *see also Kleven v. City of Des Moines*, 111 Wn. App. 284, 289, 44 P.3d 887 (2002).

See also chapter 6 (Statutory Construction of the Act), which discusses the public policy and statutory construction of the PRA in more detail.

An informed citizenry needs access to public records to have the knowledge of public issues necessary to maintain control over our government. The voters in 1972 understood this. Courts in the intervening years have recognized the Act’s purpose. The problem is applying these principles to everyday records requests. Despite the Act’s abundantly clear legislative intent, some agencies do not comply for a variety of reasons. The chapters that follow discuss day-to-day compliance and the methods of enforcing compliance.