

Cross-App.

COA # 38254-7  
NO. 810940

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STATE OF WASHINGTON  
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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, a Wash-  
ington not-for-profit corporation, Appellant,

v.

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

**BRIEF OF RESPONDENTS/CROSS APPELLANTS**

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**ORIGINAL**

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## I. INTRODUCTION

BIAW's complaint claimed defendants "violated RCW 42.56.550 by failing to provide all public records requested" and "violated the Public Records Act [hereinafter "PRA"] and the Preservation and Destruction of Public Records Act, RCW 40.14 et seq., by failing to retain emails under retention schedules set forth under the act." CP 10 (emphasis added).<sup>1</sup> However, BIAW's "issues" on appeal nowhere list any claim defendants "fail[ed] to provide" public records, Pet. Br. 1-3, and it admitted to the Superior Court that no "private right of action exists under RCW 40.14 et seq." for destruction of records. CP 722. Rather, BIAW here argues the PRA and RCW 40.14 should be judicially combined so that supposed "unlawful destruction of later-requested non-exempt public records is a 'withholding' of records and therefore a violation of the PRA" -- with "the burden of proof . . . on the agency" to disprove liability. See Pet. Br. 1.

However, as shown below: 1) neither cited statutory scheme creates a private right of action for failing to retain records when -- as here -- no record request is pending; 2) a PRA plaintiff always has the initial bur-

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<sup>1</sup> In its brief BIAW for some reason also asserts the "Voting Rights Act, 42 U.S.C. § 1974" would be violated by not retaining voting application records, Pet. Br. 34-35, but it admitted below that BIAW was not "attempt[ing] to enforce" it, CP 727 n. 4, has no evidence defendants violated it, CP 774, and would have no standing even if it did have such evidence. See Scolaro v. Dist. of Columbia Bd. of Elections and Ethics, 104 F.Supp.2d 18 (DC Dist. 2000) (injury-in-fact standing requirement not met under 42 U.S.C. § 1974).

den at least to show it requested an identifiable record and was refused; and 3) summary judgment cannot be avoided by conjecture and unsupported claims that someday unidentified and yet to be sought evidence might be discovered to rebut the actual sworn testimony of record. Indeed, BIAW's lawsuit, its motion practice, and this appeal violated RCW 4.84.185, Civil Rule 11, and RAP 18.1.

## **II. STATEMENT OF THE ISSUES**

### **A. RESTATEMENT OF ISSUES ON PLAINTIFF'S APPEAL**

1. Under the PRA, is every member of the public owed penalties, costs, and attorneys fees whenever an agency does not retain a record that no one had requested? (Assignments 1-5.)

2. In a PRA suit claiming records were unlawfully deleted, should summary judgment be denied despite plaintiff's failure either to seek or submit evidence that any unidentified record ever existed or was unlawfully deleted? (Assignments 1-5.)

3. May a plaintiff properly name both an agency and its chief official as co-defendants in a PRA action? (Assignments 2 & 5.)

4. Can a plaintiff avoid dismissal of one of its complaint's causes of action by denying it ever made the claim? (Assignments 4 & 5.)

5. Is it improper to strike inadvertently disclosed attorney/client confidences that are irrelevant and privileged? (Assignment 6.)

6. Is it improper to deny a plaintiff's retaliatory motion for sanctions where it fails to identify any defense pleading, motion, or memorandum that was filed in violation of Civil Rule 11? (Assignment 7.)

**B. CROSS APPEAL ASSIGNMENTS OF ERROR**

1. The trial court erred in entering its December 14, 2007, order to the extent it denied defendants' RCW 4.84.185 counterclaim and Civil Rule 11 motion for BIAW's improper litigation conduct. CP 1061.

2. The trial court erred in entering its January 11, 2008, order denying both defendants' GR 15 motion to seal their privileged and irrelevant attorney/client confidential communication that BIAW had filed as well as their motion to have it returned to defendants. CP 1202.

**Issues Pertaining to Cross Appeal Assignments of Error**

1. Under RCW 4.84.185, did BIAW frivolously file or pursue an action for unlawfully deleting email when it had no evidence any email actually had been illegally deleted? (Cross-Assignment 1.)

2. Under Civil Rule 11, were BIAW's pleadings, motions, or legal memoranda filed without reasonable inquiry, factually or legally baseless, or interposed for an improper purpose? (Cross-Assignment 1.)

3. Under GR 15 and RPC 4.4(b), should an inadvertently disclosed attorney/client confidential communication that BIAW filed solely to embarrass, and that was ordered stricken as irrelevant and privileged, have

been sealed and returned to defendants? (Cross-Assignment 2.)

### III. STATEMENT OF THE CASE

On October 12, 2006, Pierce County Auditor Pat McCarthy and her Election Manager Lori Augino reported by telephone to State Assistant Elections Director Pam Floyd that they had observed problems with voter registration forms submitted by a political group identified as the "Association of Community Organizations for Reform Now" (hereinafter "ACORN"). CP 61, 64-65, 1161. Having heard similar concerns from two other counties, Floyd sent a global informational email announcement to all county auditors informing them also of these reports. CP 47, 1161-2. Floyd later explained she had done so "to inform those who had not yet reported such concerns and to solicit information from them if similar questions had arisen in those offices." CP 1162. Based on information her office had received from Pierce and other reporting counties, Floyd later that day sent a second global email bulletin to every auditor describing how they too could identify ACORN registrations. CP 49, 1162.

Though Pierce County's Auditor already was aware of the issue because she had reported it, copies of the emails were sent to her anyway because it was just "easier to send a global email to all auditors . . ." Id. Floyd neither intended these bulletins to reflect a transaction of business between the agencies nor that they be "retained by county auditors as evi-

dence of such." See CP 61, 64-65, 1162, 1164. Hence, when copies of these two global emails were received by Pierce County, they would have been read and lawfully deleted as expressly recommended by the Secretary of State's own guidelines and State approved "destruction authorizations." See CP 61, 64-65, 1164; RCW 40.14.060-.070 (destruction of public records authorized when pursuant to state approved schedule).<sup>2</sup> If no special request was made, the emails then would have been kept on computer backup until later overwritten after a set retention period.<sup>3</sup> CP 66-67

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<sup>2</sup> Secretary of State "Record Management Guidelines" provide that when documents are "transmitted to multiple recipients . . . [e]ach recipient need not retain the document beyond his or her immediate need for the information it contains" because "responsibility for retaining and disposing of these documents as public records logically rests with the office from which it was issued" and "[p]rompt deletion of duplicate copies of e-mail messages . . . makes the system much easier to manage and reduces disk space consumed by redundant information." CP 511. See also CP 509 (because "content and not the medium determine the treatment of the message" the "type of messages sent by e-mail that typically have no retention value" include "[i]nformation-only copies . . . distributed for convenience of reference" and "[c]opies of inter- or intra-agency memoranda, bulletins or directions of a general information and non-continuing nature"). State approved "Destruction Authorizations" provide likewise. CP 1159 (State "Local Records Committee:" "Email messages that are not public records" include "information only copies . . . distributed for reference or convenience, such as announcements or bulletins" and may be "delete[d] . . . immediately upon review"); CP 295 ("General Records Retention" schedule: "E-MAIL MESSAGES WHICH ARE USUALLY ADMINISTRATIVE MATERIALS WITH NO RETENTION VALUE" include "information-only copies"); CP 577 ("County Auditor General Records Retention Schedule" lists as "HAVING NO PUBLIC RECORD RETENTION VALUE AND MAY BE DISPOSED OF AS SOON AS THEY HAVE SERVED THEIR PURPOSE: . . . INFORMATIONAL COPIES" of materials such as "correspondence . . . prepared for reference and informational distribution.")

<sup>3</sup> BIAW cites Attorney General guidelines that agencies should not delete "all emails after a short period of time (such as thirty days)." Pet. Br. 17 (citing WAC 44-14-03005). However those guidelines do not "bind any agency," WAC 44-14-00003, the Auditor did not delete "all emails," CP 37, 60-65, 121-153, plaintiff's request came almost half a year -- not "thirty days" -- after the only emails identified had been received, CP 28, 59, 1163-64, and the two emails actually deleted here were done so lawfully pursuant to both state guidelines and destruction authorizations. See supra at p. 5 n. 2; RCW 40.14.060-.070.

Over five months later, on March 23 of the following year, Auditor McCarthy received a public records request from another political group known as the "Building Industry Association of Washington" (hereinafter "BIAW") seeking "all records relating to or referencing . . . ACORN registration cards submitted to your office" and "all records relating to the cases referred to the prosecutor" from "this batch of registration cards . . . ." See CP 28. Within five days the Auditor had identified 615 responsive documents and wrote BIAW they were available for inspection, copying, or mailing.<sup>4</sup> CP 32, 59-60, 62-63. On April 18, 2007, however, BIAW wrote claiming it had "proof that Pierce County is withholding documents responsive to the original public records request" because the hundreds of documents the Auditor previously provided included neither the global informational "email from the Washington Secretary of State's office to Pat McCarthy" that BIAW had obtained prior to making its PRA request, nor any documentation of a telephone call County election official "Lori" supposedly had concerning "ACORN registration cards with the King County elections staff." CP 34, 47-51. The political organization threatened the Auditor that if she "fails to provide the documents requested,

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<sup>4</sup> Without any citation to the record, BIAW claims all 615 pages of documents were "non-email records." Pet. Br. 4. But see CP 59, 63 (the 615 records were produced after a search of the Auditor's "email, electronic files and hard copy files") (emphasis added).

BIAW will sue Pierce County to obtain the requested records." CP 34.

Within a week Auditor McCarthy replied that despite a further exhaustive search, neither she nor her staff had discovered the email mentioned because her office did not "ke[e]p[] the same e-mails" as the State and that any alleged telephone conversation with King County had not been documented because "we do not generate records of every . . . meeting and conversation . . . ." <sup>5</sup> CP 37, 60, 63-64. Further, both the staff and working space for the Pierce County Auditor's Office is "quite small" which allows most communications between the Auditor and her staff to be "face to face" so that they "do not generate large numbers of emails unless one of us is out of the office . . . ." CP 60-61, 64. However, this second search did reveal that one additional responsive email in the office's electronic "in-box" had been overlooked,<sup>6</sup> as well as had all those in the Auditor's "sent boxes" of email (because the later mistakenly had not been earlier checked) and therefore the 38 pages of additional emails were immediately provided to BIAW.<sup>7</sup> CP 37, 60-61, 63-64, 121-153, 1175.

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<sup>5</sup> BIAW repeatedly claims defendants "admitted destroying many" or "most of its emails," but offers no factual basis from the record as support. See Pet. Br. at 1, 3, 25. Rather, the record instead confirms that the only deleted emails responsive to the request were the two aforementioned documents from the Secretary of State. CP 61, 64-65.

<sup>6</sup> In disregard of this sworn testimony, BIAW claims without any basis in the record that "these 38 . . . e-mails were not in any of the staffs' email 'in-boxes' but instead in their 'sent boxes.'" Compare Pet. Br. 5 with CP 37, 60-61, 63-64.

<sup>7</sup> BIAW never made, nor could it, a PRA claim for late disclosure of these 38 additional

Nevertheless, on May 2, 2007, BIAW again wrote accusing the Auditor of "fail[ing] to provide all of the public records it requested," describing it as "astonishing" the Auditor did not keep duplicates of Secretary of State email bulletins and arguing "your office surely had in its possession emails and other public records pertaining to the ACORN voter registration forms prior to February" 2007 because "Pierce County knew there were problems with the ACORN registration forms prior to February 2007." CP 42. BIAW again threatened Auditor McCarthy that if she "continues to deny BIAW the records it has requested" it would "file a lawsuit to obtain the requested documents" and ominously warned her that "[u]nlawful destruction of such records can be a crime." CP 43. These repeated accusations of intentional concealment and now criminality were referred to the Prosecuting Attorney's Office which confirmed to BIAW, in both writing and a follow-up telephone conversation, that the Auditor "previously provided you all records related to or referencing voter registration cards submitted by . . . ACORN" -- other than "original voter regis-

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pages of emails. See Daines v. Spokane County, 111 Wn.App. 342, 348-49, 44 P.3d 909 (2002) (previous acquisition of records barred PRA action because its "purpose is to empower citizens to extract information from reluctant agencies" and such "would not be served" by "a plaintiff who had the records in hand before the lawsuit was filed"); Public Records Act Deskbook, §5.3(3)(d) at 5-32 (2006) ("Under a plain reading of RCW 42.17.340(1)/RCW 42.56.550(1), a requestor should have no right of action where an agency discovers that it did not release all the records or portions of records that it should have, and then corrects its error on its own initiative.") See also 9/7/07 RP 10.

tration records" protected by RCW 29A.08.710 -- and that "emails from the Washington Secretary of State's Office" were not retained because they do "not fall within the retention schedules set for local governments."<sup>8</sup> CP 25-26, 45. See also CP 176, 295, 509, 511, 577, 1159.

Disregarding this information and based solely on its suspicion that County officials either might have "violated RCW 42.56.550 by failing to provide all public records requested" or "violated the Public Records Act and the Preservation and Destruction of Public Records Act, RCW 40.14 et seq., by failing to retain emails under retention schedules set forth under the act," BIAW on May 25, 2007, filed a "Complaint for Violations of Public Records Act, RCW 42.56 and RCW 40.14" naming as separate co-defendants both Auditor Pat McCarthy -- whom it began to publicly attack<sup>9</sup> -- and Pierce County. CP 6-10. In their answer, defendants denied

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<sup>8</sup> Nothing supports BIAW's claim the Prosecutor ever told it "that any previous emails relating to the ACORN voter registration forms may have been deleted" or that the Auditor "was not required to retain any of these internal e-mails . . . under the retention laws." Compare Pet. Br. 6-8 (emphasis added) with CP 25-26. BIAW similarly misrepresents the Auditor's testimony as admitting "any requested emails . . . were deleted the same month received." Compare Pet. Br. 36 with CP 61, 64-65, 121-153.

<sup>9</sup> As it prepared to file suit, BIAW publicly attacked the Pierce County Auditor concerning the contested 2006 election claiming she "knows fraud occurred but she will never say the 'f' word -- or anything about fraud." See e.g. CP 1167. During the pendency of its suit, BIAW continued its out of court attacks on -- and misstatements concerning -- Pat McCarthy. See e.g. CP 1168 (BIAW's counsel told a political gathering that the Auditor "had let elections be swayed and 'unlawfully', he affirmed."); 1171 (after its claim was dismissed and before the hearing of her counterclaim, BIAW submitted a new PRA request to the Auditor seeking -- among other things -- "[a]ny and all records related to all business trips you have taken since January 1, 2007"); 1172 (BIAW announced it had brought an action against -- not Pierce County -- but "against Pierce County Auditor

these claims and asserted a counterclaim under RCW 4.84.185 for BIAW's filing of a frivolous suit. CP 53-57. Though BIAW could have served interrogatories with its complaint and conducted depositions within 30 days thereafter, see CR 30(a); CR 33(a), during the five months of intensive litigation on its claim BIAW served no interrogatory, no notice of deposition, nor any other discovery request. CP 190, 904-05.<sup>10</sup>

On June 21, 2007, defendants McCarthy and Pierce County moved for summary judgment based on sworn declarations from the Auditor, her Election Manager, the records custodian, and a computer expert that confirmed -- among other things -- that: 1) repeated searches revealed no requested document had been withheld from BIAW; 2) the only records not retained were the two informational emails from the Secretary of State and such was done pursuant to the State approved destruction authorization; and 3) no other undisclosed responsive emails would have existed because the small Auditor's office does not often use electronic messages for inter-

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Pat McCarthy . . . .") Even on appeal BIAW continues to publicize misrepresentations about McCarthy. See [http://www.biaw.com/Documents/Magazine/may\\_08.pdf](http://www.biaw.com/Documents/Magazine/may_08.pdf) (claiming case started when "Pat McCarthy's office refused to disclose public records . . . .")

<sup>10</sup> BIAW baselessly and repeatedly claims it argued to the Superior Court that "it should be able to conduct discovery" but "no discovery was allowed." See e.g. Pet. Br. 8 n. 7, 10, 22-24. The undisputed record instead shows that in the five months of litigation preceding the dismissal of its claim, BIAW never made a single discovery request, never moved under CR 56(f) for a continuance in order to conduct any discovery, and never attempted to make the showing required to delay summary judgment for purposes of discovery. See CP 190, 904-05; discussion infra at 25-28.

nal communications.<sup>11</sup> CP 59-79, 1157-60. Rather than offer evidence disputing this testimony or seeking a continuance under CR 56(f) to discover some opposing evidence, CP 190 n. 3, BIAW simply argued defendants' unrefuted evidence was "extremely unlikely" and somehow accused them of a "continued unwillingness to search for and disclose all the public records responsive to BIAW's request . . . ." CP 92.

On July 20, 2007, the chasm between BIAW's accusations and the actual evidence of record led the Court to hold there was no "action in this case under 42.56" for withholding documents because:

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

CP 881-82. Though the Auditor was dismissed as a separate defendant<sup>12</sup>

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<sup>11</sup> BIAW misquotes and misrepresents defendants as arguing that because they did not "possess" any "emails relating to the processing of ACORN voter registration applications because [they] destroyed them," then "[i]pso facto, they are not public records." Pet. Br. 7, 9-10, 39-40, 48. In reality defendants argued the two identified State emails were neither public records (because they had no retention value under destruction authorizations) nor unlawfully deleted, and that no other unproduced records ever existed -- much less had been unlawfully deleted. CP59-79, 1157-60; 7/20/07 RP 19-23.

<sup>12</sup> BIAW repeatedly claims Pat McCarthy moved for dismissal and later judgment on her counterclaim because she had been sued "personally," Pet. Br. 9-10, 13, 48, when in fact she was dismissed because the PRA authorizes suits only against "agencies" and not against individuals in their "official capacity" as co-defendants. See CP 72, 189, 827-28, 1184-85; RCW 42.56.550; RCW 42.56.520; RCW 36.01.020. See also discussion *infra* at 34-36.

and summary judgment was "granted as to RCW 42.56," any "claim under RCW 4.14 et seq." against Pierce County for deletion of records was "continued for further briefing." CP 197-98.

On July 30, 2007, BIAW moved for reconsideration of its dismissed PRA claim by alleging, but not showing, vague claims of "[m]isconduct" by Pierce County under CR 59(a)(2). CP 719 n. 1. In response, Pierce County opposed reconsideration as baseless and renewed its motion to dismiss any remaining "claim under 40.14 et seq." because that statutory scheme provided no private cause of action and had not been violated. CP 765-88. Though BIAW conceded no "private right of action exists under RCW 40.14 et seq." for failure to retain a record and that "only the Public Records Act [i.e. RCW 42.56 et seq.] provides a cause of action," it nevertheless resisted dismissal of the claim it said it was not making. CP 719, 722, 799-800. Similarly, though BIAW conceded the only responsive emails actually known to have once existed and not been retained were a "non-issue" because "one cannot file a Public Records Act case to obtain records one already has," see CP 797 n. 8; 9/7/07 RP 10, it repeatedly claimed "the real issues in this case" were "potentially dozens or hundreds of emails" that the unrefuted record proved neither existed nor were unlawfully deleted. See e.g. CP 721, 724, 730, 791-92, 803, 895-901. Recognizing BIAW still had made "no showing that Pierce County

improperly deleted or destroyed any record in violation of the Act, despite the plaintiff's attempt to characterize the record in that way," the Court on September 7, 2007 -- five months after BIAW filed suit -- denied reconsideration and dismissed all its claims.<sup>13</sup> CP 813, 815; 7/20/07 RP 34-35.

On October 5, 2007, defendants moved for summary judgment on their counterclaim. See CP 818-32. In retaliation, BIAW filed a CR 11 motion for sanctions calling defendants' counterclaim "a false legal position" that was "not normal" and "very odd behavior," and attacking defense counsel personally as "emotionally invested," "out of control," "over the top," "obsessed," a "very angry lawyer who has lost his professional judgment" and "lost control of himself." CP 963-64, 966 n. 1, 969, 971, 973-74.<sup>14</sup> Accompanying its motion, BIAW filed -- without prior notice to defendants, see RPC 4.4(b) -- what it claimed was a communication between defense counsel and defendant Auditor that it had obtained as part of a later PRA request to her office. CP 982. This inadvertently disclosed attorney/client communication reporting to clients and superiors on court-

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<sup>13</sup> Though BIAW submitted a declaration of the State Auditor as part of its motion, the latter nowhere disclosed "misconduct" or ever mentioned the PRA -- much less opined about the "ramifications" of "escaping PRA liability." Compare Pet. Br. 10 with CP 789.

<sup>14</sup> Such in-court personal attacks against defense counsel mirrored BIAW's out of court attacks on other County attorneys concerning its PRA requests to the Auditor. See e.g. CP 1191 (BIAW's letter to another Pierce County Prosecutor -- a "courtesy copy" of which it mailed to the *Seattle Times* -- accused that different County attorney of either having "lied" to the press or "lying to the BIAW. Which is it?")

room events and future litigation strategy was later described by the Court as "at best, innocuous and at worst, embarrassing" and was ordered stricken as irrelevant and privileged.<sup>15</sup> See 11/9/07 RP 10; CP 1059-60, 1066-67, 1193-1200. Nevertheless, the court denied both parties' motions, as well as the County's motion to seal the confidential email and require BIAW to return it. See CP 1060, 1062, 1118,<sup>16</sup> 1201-1203.

On January 11, 2007, BIAW filed a notice of appeal, and on January 15, 2007, defendants cross appealed. CP 1068, 1204.

#### **IV. ARGUMENT ON PLAINTIFF'S APPEAL**

##### **A. BIAW'S CLAIM IS LEGALLY AND FACTUALLY BASELESS**

###### **1. Failure to Retain a Public Record Before PRA Request Has Been Made Creates No Private Cause of Action**

Without analysis of any actual statutory language or precedent on point, BIAW simply asserts that RCW 40.14 and the PRA (i.e., RCW 42.56) somehow "operate together" because they supposedly "relat[e] to the same subject matter" and therefore should be "read together" to constitute some vague "unified whole, to the end that a harmonious total statu-

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<sup>15</sup> At the September 7, 2007, summary judgment hearing Judge Hirsch had disclosed her spouse's previous employment by plaintiff's counsel, CP 893, necessitating the attorney/client email that purported to inform defendants of that courtroom disclosure and confirm future strategy of seeking recovery for taxpayers of their attorney's fees and costs for defending against BIAW's baseless and improper filings. See CP 982.

<sup>16</sup> Overlooking CR 54(e), neither party obtained a timely order on BIAW's CR 11 claim.

tory scheme evolves." Pet. Br. 37-38 (quoting *In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004) (wherein this Court refused to read together the "general will" statute with the "lost will" statute)). However, far from relating "to the same subject matter," neither cited statute refers to the other, each has its own different definition of "public record," compare RCW 40.14.010 with RCW 42.56.010(2), and the PRA creates a private cause of action regulated by the Courts while RCW 40.14 concerns administrative regulation by state officials and panels. Compare RCW 42.56.550 with *Daines v. Spokane County*, 111 Wn.App. 342, 349-50, 44 P.3d 909 (2002) (proper to dismiss claim that "destroying emails after five days violates the state record-keeping provisions outlined in chapter 40.14 RCW" because a private litigant "has no right under chapter 40.14 RCW"). See also *Kitsap County v. Smith*, 143 Wn.App. 893, 910 n. 21, 180 P.3d 834 (2008)(distinguishing PRA from RCW 40.14). BIAW offers nothing to explain exactly how the PRA creates a cause of action for not retaining a record that was never requested beforehand. Rather, the PRA's actual language, precedent, rules of statutory construction and public policy refute BIAW's attempt to create a new kind of unlimited PRA liability.

First, RCW 42.56.550(1) authorizes only those "having been denied an opportunity to inspect or copy a public record by an agency" to "require the responsible agency to show cause why it has refused to allow

inspection or copying of a specific public record or class of records." (Emphasis added). Hence, there can be "no agency action to review under the Act" where the agency "did not deny [the requestor] an opportunity to inspect or copy a public record, RCW 42.17.340(1), because the public record he sought did not exist." *Sperr v. City of Spokane*, 123 Wn.App. 132, 135-137, 96 P.3d 1012 (2004) (agency's admission it once had record did not preclude summary judgment where it did not have record at time of the request) (emphasis added). See also *Kleven v. City of Des Moines*, 111 Wn.App. 284, 293, 44 P.3d 887 (2002) ("there was no violation of the PDA" because the agency had "made available all that it could find."); *Smith v. Okanogan County*, 100 Wn.App. 7, 22, 994 P.2d 857 (2000) (when "County had nothing to disclose," its failure to do so is "proper.")<sup>17</sup>

Indeed, the only PRA provision that actually regulates destruction of records instead provides: "If a public record request is made at a time when such record exists but is scheduled for destruction in the near future,

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<sup>17</sup> Ignoring the above controlling decisions despite their having been the focus of Superior Court argument, see e.g. CP 75-76, 188, 767, 771, 809, 819-20, 823, BIAW instead relies on *Prison Legal News Inc., v. Dep't of Corrections*, 154 Wn.2d 628, 115 P.3d 316 (2005) and *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994), as supposedly "indirectly addressing destroyed public records" because they state the general proposition that records should be disclosed unless they fall within an exception. Pet. Br. 18-19 (emphasis added). However, neither cited case concerns records that did not exist at the time of a request and, in any case, this Court has rejected any absolute rule that agencies "cannot withhold any materials . . . absent a specific exemption that applies to that material." *Livingston v. Cedeno*, 2008 Wash. LEXIS 610 (2008) (no PRA violation though agency never "invoked any statutory exemptions.")

the agency . . . may not destroy or erase the record until the request is resolved." RCW 42.56.100 (emphasis added). See e.g. *Yacobellis v. City of Bellingham*, 55 Wn.App. 706, 708, 780 P.2d 272 (1989) (liability where "City refused to provide copies" and a year later in response to another request informed plaintiff those records "had been discarded.")<sup>18</sup> Absent a statute creating a private cause of action for failing to retain records when no PRA request was pending, courts lack "power to add words to a statute even if we believe the legislature intended something else but failed to express it adequately." *Vita Food Prods. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). See also *Mahoney v. Shinpoch*, 107 Wn.2d 679, 684, 732 P.2d 510 (1987) ("the court will not add language to an unambiguous statute even if the court believes the statute failed adequately to express that intent."); *Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 403, 573 P.2d 10 (1977) ("We are not authorized to read into it those things which

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<sup>18</sup> BIAW claims *Yacobellis* somehow supports its claim the PRA incorporates RCW 40.14 to create a private claim for deletion before a request is made because that court said it was "unknown" when the deletion there occurred. Pet. Br. 17-18, 40 (citing 55 Wn. App. at 708). However, BIAW ignores that *Yacobellis* concerned at least two requests: one to which the "City refused to provide copies" -- presumably while the records were still in existence -- and one a year later to which the City by that time responded that those records "had been discarded" at some "unknown" time. 55 Wn.App. at 708. In that the agency never denied possessing records at the time they first had been requested and refused, *Yacobellis* is neither a case where destruction occurred before a request was made nor one that holds such would somehow violate the PRA. Further, *Yacobellis* nowhere mentions RCW 40.14 et seq. but exclusively relies on the PRA and -- as demonstrated above -- the PRA expressly regulates destruction of public records only when requests are made "at a time when such record exists." RCW 42.56.100 (emphasis added).

we conceive the legislature may have left out unintentionally.")

Second, "when a statute specifies the class of things upon which it operates, it can be inferred that the legislature intended to exclude any omitted class." *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 134, 814 P.2d 629 (1991) (statutory provision only for apportionment of responsibility among insurers in certain contexts inferred legislature intended not to apportion in others) (emphasis added). See e.g. also *Mahoney, supra* at 684-85 (where statute provided for reduction of certain benefits, reduction of other unmentioned benefits was not mandated); *Knowles v. Holly*, 82 Wn.2d 694, 701-02, 513 P.2d 18 (1973)(where in state general elections use of paper ballots was absent from list of elections where a voter was required to designate a political party affiliation, no such designation was required in state general elections where a paper ballot is used); *Washington Natural Gas Co. v. PUD No. 1 of Snohomish County*, 77 Wn.2d 94, 459 P.2d 633 (1969)(consumer protection act does not apply to municipal corporations because they were not listed among the entities to which the statute applied). Hence, under the rule of statutory construction "expressio unius est exclusio alterius," the absence from the PRA of any attempt to regulate retention of records before a request has been made requires a "court to give weight and significance to this obvious legislative vacancy." C.f. *State v. Swanson*, 116 Wn.App. 67, 348, 65 P.3d 343 (2003)(statement of

specific conditions for restoration of right to firearms "must be given meaning and effect" and such "commands that no other conditions are required.") Indeed, if the legislature had intended PRA liability for deletion before anyone had ever requested a record, it would not have expressly limited those actions to requests "made at a time when such record exists."

Third, this distinction by the legislature makes sense because any privately actionable duty to retain public records before anyone has made a PRA request would impermissibly create a duty owed -- not to a specific identifiable requestor who seeks currently existing records -- but to the public in general for records that do not exist. This would violate the "public duty doctrine" which requires that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one)." See Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). This Court has long held that "[l]iability can be founded upon a municipal code if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons," because "legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability." Id. at 164 & 170 (emphasis added). See also Baerlein v. State, 92 Wn.2d 229, 232, 595 P.2d 930 (1979) (when legislatures "impose a duty on public officials as a

whole, no duty in tort is owed to a particular individual.") *Donohoe v. State*, 135 Wn. App. 824, 834, 142 P.3d 654 (2006) (same). Though RCW 42.56.100 at least describes a "particular and circumscribed class of persons" -- i.e., those who make a PRA request "at a time when such record exists" -- under BIAW's theory government would be liable in perpetuity to everyone who files a request after an agency no longer retains a record.

It is hard to imagine a worse example of unlimited liability than BIAW's attempt to create a new cause of action allowing an unlimited class of plaintiffs -- indeed, the entire populace -- to recover whenever government "fails" to retain a public record. See e.g. *Hartley v. State*, 103 Wn.2d 768, 785, 698 P.2d 77 (1985) (where under a statute "the class of persons thus protected is the public in general," as a matter of law "[p]ublic policy considerations also dictate against liability" because otherwise "government would be open to unlimited liability . . ."); *Moore v. Wayman*, 85 Wn.App. 710, 726, 934 P.2d 707 (1997) (statute "was not meant to unleash unlimited liability upon the government.") Hence, in "the public interest, government agencies facing litigation need" reasonable protections or else "the public is exposed to unlimited liability," and "policies underlying the open government provisions of the public disclosure act do not outweigh the counterbalancing provisions" of other public policies. See *Soter v. Cowles Publ'g Co.*, 131 Wn.App. 882, 905, 130

P.3d 840 (2006), aff'd 162 Wn.2d 716, 174 P.3d 60 (2007) (PRA subject to work product and attorney/client privileges).

Because precedent under RCW 42.56.550(1) holds there can be "no agency action to review under the Act" if there was no "denial" of access to an existing record, see Sperr, supra; Kleven, supra; Smith, supra., because the RCW 42.56.100 expressly regulates retention only "[i]f a public record request is made at a time when such record exists," and because public policy precludes any private cause of action for failing to retain records where no PRA request was pending at the time, there can be no liability for requests that seek records which no longer exist.

**2. Even if PRA Were to Allow Suit Over a Nonexisting Record, Dismissal Still Required**

Even if the law were to change so that the legislature could create an ill-advised cause of action allowing every member of the general public to sue over records that did not exist at the time of the request, there was no evidence any requested record was unlawfully destroyed here. BIAW tries to hurdle this additional fundamental obstacle by asking this Court to: 1) create a presumption of liability unless an agency can prove it did not possess and illegally destroy some record at some point; 2) hold it should have been granted a continuance it never requested to conduct discovery it never sought; or 3) allow innuendo and baseless speculation to constitute

evidence. Pet. Br. 20-36. However, the law and facts are otherwise.

**a. Agency Burden of Proof Does Not Rise Until After Plaintiff Shows Identifiable Record Was Refused**

Based on two cases ruling an agency must prove a withholding is justified by an exception, BIAW argues it should be allowed to bring a PRA suit without evidence a requested public record ever existed -- much less has been unlawfully destroyed -- and automatically be awarded fees, costs, and penalties if an agency cannot disprove mere allegations regarding an imagined record. Pet. Br. 21 (citing *Yacobellis*, *supra*; *PAWS*, *supra*.)<sup>19</sup> This ignores court rules, statutes, precedent, and common sense.

Civil Rule 11 has always required that "[e]very pleading, motion and legal memorandum" be "well grounded in fact," see CR 11, and PRA actions are neither exempt from this requirement nor authorized to be brought on mere suspicion. See *Kleven*, 111 Wn.App. at 290-291 (recognizing CR 11 applies to PRA actions). On the contrary, the express language of the PRA imposes on requestors the burden to first show they made a request for "identifiable public records" and were refused. RCW 42.56.080; *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-448, 90 P.3d 26 (2004); *Kleven*, 111 Wn.App. at 294. Indeed, on its face the statu-

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<sup>19</sup> See also discussion supra at p. 16 n. 16 & p. 17 n. 17.

tory "burden of proof" imposed by RCW 42.56.550(1), but nowhere actually quoted or analyzed by BIAW, applies only after an agency's "refusal to permit public inspection and copying" of "a specific public record or class of records" -- it nowhere requires an agency disprove mere allegations. See e.g. *Bonamy v. City of Seattle*, 92 Wn.App. 403, 408-09, 960 P.2d 447 (1998) (as "a threshold matter" the public disclosure "act only applies when public records have been requested."); *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn.App. 433, 441, 161 P.3d 428 (2007) (though "the party seeking to prevent disclosure . . . has the burden to prove that the public record should not be disclosed" this "burden of proof only applies when a party seeks to disclose a public record") (emphasis added).<sup>20</sup>

Though BIAW erroneously claims its suit "is the first deleted email case in Washington," Pet. Br. 14, a previous decision not only exists and was repeatedly cited below, see CP 770, 778-79, 783-84, 810-11, 829-13, 998-99, 1138-39, but expressly rejects the unprecedented burden sought to

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<sup>20</sup> Ignoring *Bonamy* altogether, BIAW disregards the above cited language and claims instead *Dragonslayer* held that the "burden of proof was on the party resisting disclosure, not the requestor," and then claims at least the case was remanded "for a determination of whether the records were used by the agency -- something [BIAW] is specifically asking this Court to do." Pet. Br. 22. As to the burden of proof, the actual language of *Dragonslayer* is to the contrary and as quoted above. As to a remand, *Dragonslayer* involved an injunction where the required findings were inadequate and not a summary judgment where plaintiff failed to rebut the only evidence of record. 139 Wn.App. 433-34.

be imposed here. In *Daines v. Spokane County*, a plaintiff who had previously acquired emails under a PRA request and who in response to a later request was told they had been deleted from electronic inboxes, brought suit alleging both that the agency had "violate[ed] the public records retention statutes," and that the PRA was violated because "every response must cite one of the specific exemptions." 111 Wn.App. at 346 & 348-49. This argument was rejected since the burden to show an exemption exists only in "the situation where the agency has the records but says, 'we are not going to give them to you,'" and not where -- as here, CP 59-67, 1175 -- a "County said, in effect, 'we do not have these records.'" Id. at 348.

RCW 42.56.080 and RCW 42.56.550(1) require BIAW to first show it requested an "identifiable public record" and was "refused." No statutory language or precedent holds that merely filing a PRA suit instead creates a presumption of liability for attorney's fees, costs, and penalties unless government somehow proves the negative that it did not possess and illegally destroy some phantom record at some earlier time. Here, other than two emails received from the Secretary of State and properly deleted under State law, supra at 5 n. 2, the record is devoid of evidence that "potentially dozens or hundreds" of other identifiable responsive emails even existed -- much less were somehow deleted unlawfully. Rather, all testimony is to the contrary. See CP 59-67, 1157-64, 1173-76.

**b. BIAW Was Not Entitled to a Continuance That It Never Requested So It Could Conduct Discovery It Never Sought**

Next, BIAW seeks reversal by claiming it supposedly "asked the trial court" to "allow the conduct of discovery" but 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." Pet. Br. 23-24. These assertions by BIAW are directly refuted by the unambiguous record.

First, BIAW can hardly complain the initial summary judgment hearing came too soon when it had noted and argued its own dispositive motion for the same day of July 20, 2007. CP 12, 857, 1134. Indeed, the PRA presumes a quick resolution of litigation and penalizes agencies when such is not the case. See e.g. RCW 42.56.520 (agencies must respond within five days of request and establish procedures for the "most prompt possible review of decisions denying inspection," while judicial review is authorized "at the end of the second business day following the denial of inspection"); RCW 42.56.550 (authorizing motion if agency estimate of time for response is not "reasonable" and monetary penalty "for each day [requestor] was denied the right to inspect" unlawfully).

Second, though the record shows BIAW had mentioned proposed discovery in its briefing, CP 83-84, 93, 96 n. 5, the Court will look in vain

for any occasion in the five months before BIAW's complaint was dismissed where it ever actually attempted to conduct it. See CP 190, 905-08. BIAW's claim "the case had already been dismissed the same day answers to interrogatories would have been due" had it actually served any, Pet. Br. 23, simply ignores the facts. Interrogatories could have been served with the complaint, while depositions were available within days of the June filing of defendants' initial summary judgment motion. CR 30(a) & 33(a); CP 6, 68. Even if for unexplained reasons only interrogatories would do and there was some good reason for not serving them the month before summary judgment was filed, if BIAW had good cause it still could have moved under CR 56(f) for a continuance of even the initial summary judgment hearing but did not -- despite defendants having listed CR 56(f) and its requirements in time for it to have done so. CP 190 n. 3. Finally, BIAW's "case" was not dismissed until September 2007 -- almost five months after it filed its May complaint, CP 6, 813-17 -- so that even after partial summary judgment in July, BIAW had until September to pursue all forms of discovery before reconsideration was denied and defendants' renewed summary judgment motion was granted, but it declined. Id.

Third, BIAW nowhere explains how -- even if it had filed a CR 56(f) motion or actually pursued discovery during the five months its suit was being litigated -- it could have shown the sworn testimony of the

elected Auditor, various County employees, and the Secretary of State's Assistant Elections Director was somehow false and that other responsive emails actually had existed but been unlawfully deleted. See CP 59-67, 1157-64, 1173-76. See also e.g. *Winston v. Dep't of Corr.*, 130 Wn.App. 61, 65, 121 P.3d 1201 (2005) (CR 56(f) motion should be denied where "(1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.")

In short, BIAW had far more than "adequate time for discovery," and cannot complain when it chose to neither seek discovery nor move for a continuance upon a proper showing. See *Colwell v. Holy Family Hospital*, 104 Wn.App. 606, 614-15, 15 P.3d 210, *rev. denied*, 144 Wn.2d 1016 (2001) ("a continuance was never clearly requested; therefore, the trial court could not err."); *Turner v. Kohler*, 54 Wn.App. 688, 691-93, 775 P.2d 474 (1989) (dismissal proper where plaintiff's counsel argued that "[u]ntil further discovery has been taken, . . . defense Motion for Summary Judgment should be denied as a result" but "did not mention CR 56(f), nor did it explicitly request a continuance," or "state what discovery was contemplated or why the discovery could not have been pursued prior to the summary judgment proceeding."); *Guile v. Ballard Cmty. Hosp.*, 70

Wn.App. 18, 24-25, 851 P.2d 689 (1993) (if plaintiff "needed additional time, the proper remedy would have been to request another continuance from the trial court" and "[b]ecause she failed to do this, . . . she is precluded from raising this issue on appeal" since to "hold otherwise would constitute an unwarranted encroachment on the trial court's discretion to dismiss cases which fail to raise genuine issues for trial.")

**c. Nothing in the Record Contradicts Testimony  
That No Document Was Unlawfully Destroyed**

BIAW lastly argues the requirements for summary judgment were not met. Pet. Br. 24-40. Though summary judgment requires defendants "show that there is no genuine issue as to any material fact and that [they are] entitled to a judgment as a matter of law," this is met merely "by 'showing' -- that is pointing out . . . that there is an absence of evidence to support the nonmoving party's case." *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Hence a "defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue" and "[i]n response the nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists." *Las v. Yellow Front Stores*, 66 Wn.App. 196, 198, 831 P.2d 744 (1992) (emphasis added). See

also *Tinder v. Nordstrom, Inc.*, 84 Wn.App. 787, 791, 929 P.2d 1209 (1997) (defendant's "burden may be met by pointing out that there is an absence of evidence in support of the nonmoving party's case."); *Guile v. Ballard Cmty. Hosp.*, 70 Wn.App. at 25 ("a defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony.")

**1) Sworn Testimony Showed No Other Responsive Record Existed or Was Unlawfully Deleted**

Here, defendants did more than just "challeng[e] the sufficiency" of BIAW's non-existent evidence, but affirmatively showed no other responsive public record had ever existed or been unlawfully deleted. Specifically, defendants submitted sworn declarations from County and State officials that confirmed: 1) repeated searches revealed no requested document had been withheld from the BIAW; 2) the only records not retained were the two informational emails from the Secretary of State and their deletion was authorized by both the Secretary's own guidelines and State approved destruction authorizations; see discussion supra at 5 n. 2; and 3) no other undisclosed responsive emails would have existed because the small Auditor's office interacts "face to face" and does not use electronic messages for internal communications unless staff is absent from the office. CP 59-79, 1157- 64, 1173-77.

**2) BIAW's Conjecture Does Not Show Any Responsive Record Was Unlawfully Destroyed**

As to the quantum of evidence plaintiff must show in response, the question is not whether there is literally no evidence -- for on summary judgment also a "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505; 91 L.Ed.2d 202 (1986) (emphasis added). Here in response, BIAW failed to present even a "scintilla of evidence" to show some identifiable public record was unlawfully destroyed -- much less "specific facts" upon "which the jury could reasonably find for the plaintiff." Rather, in response to the aforementioned undisputed facts of record, BIAW now offers a list of supposed "genuine issues of material fact" that even a cursory examination reveals is not based on "specific facts" but impermissibly "on speculation, [or] argumentative assertions that unresolved factual matters remain . . . ." *Peterick v. State*, 22 Wn. App. 163, 181, 589 P.2d 250 (1977). See also Pet. Br. 25-36.

First, BIAW argues various hypothetical unanswered questions somehow overcome the actual facts of record. For example, BIAW asserts that because defendant's computer expert's declaration addressed external emails, this somehow "raises the question: Were intra-Agency

emails destroyed?" Pet. Br. 25-7. However, "plaintiff's equation of 'unanswered questions' with 'genuine issues of material fact' belies a perhaps too frequently held misconception" because on summary judgment the movant is not "compelled to meet every speculation, conjecture or possibility by alleging facts to the contrary." *Bates v. Grace United Methodist Church*, 12 Wn.App. 111, 114-115, 529 P.2d 466 (1974). In any case, sworn declarations of the Auditor and her staff separately and specifically addressed internal communications and explained they "do not generate large numbers of emails unless one of us is out of the office" because their "general means of communication is 'face to face.'" CP 60, 64.<sup>21</sup>

Next, based on various arguments, BIAW claims it is "highly unlikely" Auditor staff mostly met "face to face" about ACORN so that only one relevant internal email was "used" during a four month period between October and January because "[w]e live in an email world." Pet. Br. 27-30, 31-32. However, good office management practice instead recognizes such over-reliance on email is to be discouraged:

Technology was meant to facilitate personal communica-

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<sup>21</sup> For the same reason, BIAW's similar contrived "unanswered questions" arising from its failure to seek discovery also offer only speculation rather than the required "specific facts:" i.e., 1) discovery on County "retention policies" might create a "material fact" because it "would shed light on the issue of whether requested emails were lawfully or unlawfully destroyed," Pet. Br. 34; and 2) discovery on "[w]hether the Agency or expert could have recovered the emails is a genuine issue" because it might show "the Agency could have provided requested emails but instead withheld them." *Id.* at 36.

tion, not to do away with it. . . . [T]here's a host of visual and unspoken cues that register consciously and unconsciously when you talk to someone in person. Yes, the phone is far subtler than email, but it's a blunt instrument compared to face-to-face interaction. Which is why there are some things that are far better done in person than any other way . . . . Keep in mind, too, that email was not made for basic decision making that involves a lot of equal voices.

Shipley and Schwalbe, Send: The Essential Guide to Email for Office and Home p. 50 (Knopf 2007). In any case, an "opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof." *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 627, 69 P.3d 895 (1991). BIAW's argumentative assertion that an office cannot use internal email with restraint does not support a claim the elected Auditor and her staff for some reason gave false testimony nor overcome the undisputed proof that between October 2006 and January 2007 "there was only one email" internally created about ACORN. CP 60, 64 (emphasis added).

BIAW next argues defendants "could not say with certainty that it did not use email for the ACORN registration" and cites the dissimilar *Rowley v. American Airlines*, 885 F.Supp. 1406, 1413-1414 (D. Or. 1995). Pet Br. 30. However, in *Rowley* a plaintiff's motion was denied because a genuine issue of fact existed when her testimony was contradicted by defendant's evidence of its routine business practices. Here, in contrast,

BIAW has no opposing testimony contradicting defendants' undisputed practice -- much less anything of record meeting its burden of proving defendants did "use" other "email for the ACORN registration."

BIAW also asserts -- on an issue nowhere listed in its "issues" statement, Pet. Br. 3 -- that there is a question whether "not all emails were destroyed" after all because supposedly: 1) the 38 pages of emails provided by defendants in April of 2007 show all "inboxes" were deleted in alleged violation of "retention laws;" 2) they must have fostered replies that were not produced, id. at 32-33; and 3) defendants "say any requested emails ... were deleted the same month received" but do not say when, and therefore they might still exist. Id. at 36. However, neither "all" emails in "inboxes" nor all "requested emails" were deleted, supra at p. 7 n. 5-6, p. 9 n. 8; the only emails shown deleted were the two from the Secretary of State -- and such was done lawfully, supra p. 5 n. 2, and "cer-  
tainly months prior to receiving the March 2007 BIAW request ...." CP 61, 65 (emphasis added). Indeed, after the initial production of 615 requested records, BIAW was provided 38 additional emails from both "in" and "sent" boxes because defendants did retain them. CP 32, 37, 59-60, 62-64. No retention law requires duplicate emails be retained in both "in" and "sent" boxes. Though not every recipient listed on an email will respond, those 38 pages of emails include replies thereto, CP 121-153, and

this creates no "reasonable inference" that "some responsive emails were not provided" -- especially when the undisputed evidence instead affirmatively shows all responsive records were provided. CP 59-67, 1175.<sup>22</sup>

Finally, BIAW asserts that because the two Secretary of State emails were lawfully deleted, this somehow raises "a reasonable inference" there must be other responsive emails that were unlawfully deleted since supposedly defendants' retention "system is not operating as the law requires." Pet. Br. 34-35. Of course, one of the reasons BIAW's claims were dismissed is because it has no evidence defendants' retention system was "not operating as the law requires" -- even as to the two Secretary of State emails that were undisputedly deleted according to law. Supra at p. 5, n. 2. BIAW's circular "conjectures do not rise to the level of fact and specificity necessary to prevent summary judgment." *Smith v. Preston Gates Ellis*, 135 Wn.App. 859, 865, 147 P.3d 600 (2006).

#### **B. OFFICIALS CANNOT BE SUED AS PRA CO-DEFENDANTS**

Assuming it had a PRA claim, BIAW summarily argues Pat McCarthy should not have been dismissed as a co-defendant because a

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<sup>22</sup> BIAW also cites *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 328 (D.C. 1999), for the point that "generalized claims of destruction or non preservation cannot sustain summary judgment" against a claim that records still exist and are being withheld. Pet. Br. 19, 36. Here, of course, defendants do not make "generalized claims of destruction or non-preservation" but deny them and affirmatively proved no existing records had been withheld. See e.g. CP 59-67. All "generalized claims" are by BIAW.

"Public Record Act Deskbook" states the "PRA has been applied to individual[ ] municipal officials acting in their official capacities" based on cases where officials had in fact been named. See Pet. Br. 40-41. However, no case cited in that "Deskbook" or by BIAW anywhere discusses -- much less approves -- naming "individual municipal officials" in a PRA suit. See cases cited at Pet. Br. 41 n. 27. Instead, the PRA authorizes suits only against an "agency" -- not against its officials in any capacity. See RCW 42.56.550; RCW 42.56.520; RCW 42.17.020(2); *Yakima Newspapers v. Yakima*, 77 Wn.App. 319, 329, 890 P.2d 544 (1995) (refusing award when "an individual and not the City opposed" disclosure).

Further, naming an elected individual in their "official capacity" does not substitute for naming a County because "[t]he name of a county, designated by law, is its corporate name, and it must be known and designated thereby in all actions and proceedings touching its corporate rights, property, and duties." RCW 36.01.020 (emphasis added). See also *Nolan v. Snohomish County*, 59 Wn.App. 876, 883, 802 P.2d 792 (1990) ("in a legal action involving a county, the county itself is the only legal entity capable of suing and being sued."); *Foothills Dev. Co. v. Clark County Bd of Cy Com'rs*, 46 Wn.App. 369, 730 P.2d 1369 (1986), rev. denied, 108 Wn.2d 1004 (1987) (commissioner cannot be sued as County's substitute). Indeed, Pat McCarthy was not named as a substitute for Pierce County but

as a separate defendant. BIAW's complaint on its face expressly names both "McCarthy" and "Pierce County," CP 7, and accuses both "McCarthy and Pierce County" of having "violated the Public Records Act and the Preservation and Destruction of Public Records Act . . . ." CP 10.<sup>23</sup>

BIAW's baseless listing of Pat McCarthy as its first named co-defendant, its opposition to her dismissal, and its appeal even now of that dismissal was frivolous and reflects an improper purpose that has nothing to do with the PRA. See RCW 4.84.185; CR 11; RAP 18.1.

**C. BIAW CANNOT AVOID DISMISSAL OF COMPLAINT'S RCW 40.14 CLAIM BY THEREAFTER DENYING IT MADE IT**

Though the complaint's "CAUSES OF ACTION" expressly alleged a violation of the PRA "and . . . RCW 40.14 et seq.," CP 10 (emphasis added), and only the latter claim remained after the July 2007 dismissal of the PRA action, CP 198, 815, BIAW argues the claim's later dismissal was somehow an "advisory opinion" because by then it had denied making that claim while inconsistently opposing its dismissal. Pet. Br. 41. BIAW attempts to explain its opposition to this dismissal by claiming it feared defendants were "attempting to be the 'prevailing party'" and thereby "re-

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<sup>23</sup> BIAW's brief obscures this fact by choosing to inaccurately refer to both Pat McCarthy and Pierce County in the singular "as 'Agency.'" Pet. Br. 2 n. 2.

duce an eventual attorney's fee award" to BIAW that it hoped somehow to still extract despite its earlier summary judgment loss. Id. 42.

However, "substantially prevailed" defenses in PRA suits had long been rejected. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 105 n. 20, 117 P.3d 1117 (2005) (though no records were compelled, the ruling that the city acted improperly allowed fee award because "statute says nothing about 'substantially prevailing'" but dictates "mandatory fees and penalties.") BIAW's opposition therefore violated CR 11, see *Manteufel v. SAFECO Ins. Co. of Am.*, 117 Wn. App. 168, 176, 68 P.3d 1093 (2003) (CR 11 violated because assertion "was not a correct statement of applicable law because it had been overruled"), and its appeal for dismissing a claim it says it never made now also violates RAP 18.1.

**D. STRIKING OF IRRELEVANT PRIVILEGED COMMUNICATION WAS PROPER AND IS NOT GROUND FOR APPEAL**

BIAW nowhere explains how the Superior Court's striking an inadvertently disclosed attorney/client communication on grounds of privilege and irrelevance somehow justifies reversal of summary judgment. Compare Pet. Br. 43-48 with CP 1032-34, 1151-52. Likewise, BIAW nowhere explains how this submission was supposedly relevant under ER 401 but expressly admits its stated basis for filing it -- i.e. to show defendants wished to recover their costs and fees, CP 973-74, 1013 n. 5 --

"merely repeated the Agency's already well known desire to seek money from the Requestor." Pet. Br. 46 n. 30. Though its argument would support reversal of neither summary judgment nor the order to strike, BIAW asks this Court to meaninglessly reject the additional ground of privilege.

However, the record is uncontradicted that the subject email was neither intentionally provided nor waived as part of the Auditor's 1,724 pages of responsive documents provided under a later request. CP 1175-76. Likewise, the record is uncontested the email was kept confidential, and on its face purports to be from defense counsel exclusively to clients in the Auditor and Risk Management offices and advisory attorneys. CP 982, 1175-76, 1193-1200. Further, the supposed purpose for its submission by BIAW was to show defense counsel had advised them to seek recovery for taxpayers of their attorneys fees and costs. CP 982. As such, it not only was protected from disclosure by RCW 42.56.290 and RCW 5.60.060(a)(2), see Harris v. Drake, 152 Wn.2d 480, 486, 99 P.3d 872 (2004) (excluding evidence where privileged communication was not "knowingly and voluntarily provided" to opposing party), but its filing without prior notice violated RPC 4.4(b). See also infra. at pp. 46-49.

**E. BIAW'S RULE 11 CLAIM WAS PROPERLY DENIED**

BIAW summarily argues that defendants' "counterclaim was, itself, frivolous so the Requestor filed a CR 11 motion," but states it "will not . . .

repeat[] here" how that counterclaim was "frivolous" and instead refers the Court to its "memorandum of law in support." Pet. Br. 48-49. However, RAP 10.3(a)(5) requires that BIAW's appellate brief contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record," and this Court has held it will "not allow" an appellant "to incorporate by reference parts of its trial brief" but will "hold that [appellant] has abandoned this issue on appeal." *US West Communications, Inc. v. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 112, 949 P.2d 1337 (1997). See e.g. also *McNeil v. Powers*, 123 Wn.App. 577, 591, 97 P.3d 760 (2004) ("The issues relying on incorporated briefing are considered abandoned."); *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290 (1998) ("Instead of making a reasoned argument, Holland simply incorporates his trial briefs by reference" but "trial court briefs cannot be incorporated into appellate briefs by reference" and therefore the Court "holds that Holland has abandoned the issues for which he attempted to incorporate arguments by reference to trial briefs or otherwise.") Hence, the issue has been abandoned.

In any case, the only supposed factual assertion made in BIAW's appellate briefing on its CR 11 claim -- and hence the only issue to which defendants could respond -- concerns BIAW's odd allegation that "the Agency's counsel had lost his professional judgment by . . . writing an an-

gry letter to the editor . . . ." Pet. Br. 11, 48. However, the actual cited letter to *The Olympian* was a factually accurate defense of the Superior Court Judge against a public campaign that misstated her decision and was expressly aimed at influencing her judicial reconsideration by offensively claiming her supposed "inexperience is the reason for her misguided decision." Compare <http://www.theolympian.com/opinion/story/196600.html> with CP 984. Further, BIAW nowhere explains how a factually accurate letter, that defendants never filed with the Court and that defended the Court against an unfair attack, is regulated by or relevant to CR 11. See CR 11 (regulating "a pleading, motion, or legal memorandum"); Tegland, 3A Wash. Pract. p. 231 (5th ed., 2006) ("CR 11 does not apply" to conduct "unrelated to signed motions, pleadings, or legal memoranda . . ."). Hence, even if it had not been waived, BIAW's CR 11 appeal would be baseless.

#### **IV. ARGUMENT ON CROSS-APPEAL**

##### **A. JUDGMENT SHOULD HAVE BEEN AWARDED ON DEFENDANTS' COUNTERCLAIM AND CR 11 MOTION**

###### **1. Filing, Pursuit, and Appeal of Biaw's Clams Violated RCW 4.84.185 and RAP 18.1**

RCW 4.84.185 provides in pertinent part:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reason-

able expenses, including fees of attorneys, incurred in opposing such action . . . .

This statute is applicable to "any civil action" and therefore appropriate where an Auditor has been sued in an action that "touches upon politics or the public interest." See Reid v. Dalton, 124 Wn.App. 113, 127, 100 P.3d 349 (2004) (County auditor entitled to award in suit "about the election process"). See e.g. also Layne v. Hyde, 54 Wn.App. 125, 773 P.2d 83 (1989) (fees and costs properly awarded to state). Dismissal of such a governmental entity's counterclaim will be reversed "if based on untenable grounds." Deja Vu, Inc. v. City of Federal Way, 96 Wn.App. 255, 263, 979 P.2d 464 (1999) rev. denied 139 Wn.2d 1027 (2000) (fees and costs properly awarded to state because plaintiff's claim against it was "not supported by any rational argument based on the law or the facts.")

A "frivolous" action under the statute is "one that cannot be supported by any rational argument on the law or facts." Clarke v. Equinox Holdings, 56 Wn.App. 125, 132, 783 P.2d 82 (1989) (affirming award of fees where plaintiff's "responses to the three summary judgment motions contained no support for" two of his challenges while his third "was unsupported by the evidence.") See also Layne, supra (complaint against State was "frivolous" because it could not "be supported by any rational argument on the law or facts.") Though this test is "easily met" where the

initial "complaint lacks a factual or legal basis," *Harrington v. Pailthorp*, 67 Wn.App. 901, 841 P.2d 1258 (1992), rev. denied, 121 Wn.2d 1018 (1993), it also is met where "by the time of argument" no admissible evidence was available yet plaintiff "decided to press on." *Escude v. King County Pub. Hosp. Dist.*, 117 Wn.App. 183, 69 P.3d 895 (2003). No "improper purpose" for filing the complaint need be shown. *Harrington*, id.

Here, it has been documented how BIAW's complaint from the outset "lack[ed] a factual or legal basis," and how "by the time of argument" no evidence had even been sought but BIAW repeatedly "decided to press on." Supra at 4-13, 28-34. BIAW faced uncontested sworn declarations confirming that no further responsive documents had ever existed or been unlawfully destroyed, CP 59-67, 1157-64, 1173-76, and that as a matter of law McCarthy could not be a co-defendant in a PRA action. CP 72, 189, 827-28, 1184-85. Nevertheless, BIAW opposed dismissal without authority for a private claim, without evidence any emails had been unlawfully deleted, and without any legal basis for suing Pat McCarthy.

Even after the Court expressly ruled BIAW had made no "showing that Pierce County has these documents in their possession, that they have not disclosed" and "no showing that they existed," 7/20/07 RP 8, 26-28, plaintiff moved for reconsideration -- again without any attempt to make the required factual showing but baselessly accusing the County of "mis-

conduct." CP 718-32. In so doing BIAW violated RCW 4.84.185, as does its appeal of those very same issues here. See RAP 18.1.

**2. BIAW Violated CR 11 and RAP 18.1.**

"The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system" and requires attorneys to "stop, think and investigate more carefully before serving and filing papers." *Bryant v. Joseph Tree*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). The rule provides in pertinent part that signing pleadings or legal memoranda certifies an "inquiry reasonable under the circumstances" has been conducted and:

(1) [I]t is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, [and] (3) that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or legal memorandum, including reasonable attorney fee.

CR 11(a). Accordingly, "CR 11 addresses two types of problems relating to pleadings, motions and legal memoranda: filings which are not 'well grounded in fact and . . . warranted by . . . law' and filings interposed for 'any improper purpose'." *Bryant*, supra at 217. Such awards under Rule

11 are equally available to municipalities. See e.g. *Deja Vu, Inc.*, 96 Wn. App. at 269 (denial of fees and costs to city reversed); *Layne*, 54 Wn. App. at 135 (affirming fees and costs award to State).

As to the first type, a "filing is 'baseless' if (a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law." *Hicks v. Edwards*, 75 Wn.App. 156, 876 P.2d 953 (1994). Such is then "subject to Rule 11 sanctions where it is both baseless and made without a reasonable and competent inquiry." *Bryant*, 119 Wn.2d at 220. Rule 11 applies not only to the filing of a frivolous complaint, but also to filings made after "any factual or legal basis for pursuing [plaintiff's] claims evaporated" during the course of the litigation. See *MacDonald v. Korum Ford*, 80 Wn.App. 877, 884, 912 P.2d 1052 (1996). Hence, a CR 11 violation has been deemed "egregious" where, as here: 1) a complaint was filed based on "bare suspicion" that a defendant "may have" acted improperly; 2) summary judgment was opposed despite defendant's sworn statements showing plaintiff's allegations were untrue, that all records had been provided and explaining why plaintiff's suspicions were unfounded; and 3) reconsideration was sought despite the fact it "produced no evidence to support" plaintiff's factual claims. See *Watson v. Maier*, 64 Wn.App. 889, 894-97, 827 P.2d 311 (1992), *rev. denied* 120 Wn.2d 1015 (1992). In short, CR 11 allows courts

to sanction those "who do not know when to stop." Id. at 891.

So too here, it has been demonstrated that BIAW consistently violated CR 11 by filing a complaint based on "bare suspicion," opposed summary judgment despite defendant's uncontradicted sworn testimony disproving its allegations, and sought reconsideration despite the fact it "produced no evidence to support" it. Supra at pp. 4-12, 28-34. Indeed, in so doing, BIAW made affirmative assertions without factual basis such as that there were "dozens or hundreds of emails" that had been unlawfully deleted. See e.g. CP 721, 724, 730, 791-92, 803, 895-901. Likewise, BIAW not only needlessly opposed dismissal even of a claim it agreed it did not have, CP 799 -- and now appeals that dismissal -- but therein misrepresented both the facts and holding of such precedent as *Daines v. Spokane County*, supra which on appeal it now simply ignores. Compare 111 Wn.App at 346 & 449; CP 810 n. 3 with CP 803; see generally Pet. Br.

BIAW also repeatedly demonstrated the second type of improper filing -- one imposed for an "improper purpose, such as to harass . . . ." CR 11. Before, during, and after this litigation, BIAW publicly attacked the Pierce County Auditor Pat McCarthy, see supra at p. 9 n. 9, and its naming of her as a separate defendant, resistance to her dismissal and now appeal of that dismissal are not only contrary to RCW 42.56.550's authorization of suits "against an agency" but a continuation of this harassment.

Likewise, BIAW's filings attacked defense counsel personally as "emotionally invested," "out of control," "over the top," "obsessed," a "very angry lawyer who has lost his professional judgment," and "lost control of himself." CP 963-64, 966 n. 1, 969, 971, 973-74. Further, without notice as required by RPC 4.4(b), and in the apparent hope it would prejudice the court, BIAW filed an "embarrassing" confidential email whose only "pertinent part" was its "references to a disclosure made, in open court, by the court, regarding a matter not at issue in the litigation." See CP 1066-67.

The Superior Court erred in allowing BIAW's repeated litigation misconduct to continue without correction, and CR 11 authorizes an award of fees and costs to defendants both below and now on appeal.

**B. IRRELEVANT AND PRIVILEGED COMMUNICATION SHOULD HAVE BEEN RETURNED AND ITS FILING SEALED**

Though email from defense counsel to clients and superiors was properly stricken as irrelevant and privileged, id.; CP 1081, 1175-77, 1193-1200, see also e.g. RCW 42.56.290; Harris, 152 Wn.2d at 486, the trial court denied defendant's motion to seal and refused to order the confidential email returned. CP 1211. Such was reversible error.

The comment to RPC 4.4 confirms that "[w]hether the lawyer is required to . . . return[] the original document, is a matter of law." Here the Court had ruled the attorney/client email was privileged and protected,

CP 1082, and as a matter of law unintentionally disclosed and privileged attorney-client communications are to be returned. See e.g. *Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 522 N.Y.S.2d 999, 1006, 132 A.D.2d 392 (N.Y. App. 1987) (trial court reversed when it refused to order return of a privileged attorney-client communication that had been unintentionally disclosed); *Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 449 (S.D. N.Y. 1995) (federal court under Rule 26 ordered return of unintentionally disclosed privileged attorney-client communications); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 939 (S.D. FL, 1991) (ordering "[a]ll copies" of unintentionally disclosed privileged communications "turned over to defendant's counsel").

As to the continued availability of the confidential communication in the Clerk's files after BIAW filed it without notice to the holders of the privilege and against their wishes, this Court recognizes that even privileged material willingly submitted by the holder of the privilege may be sealed under GR 15 if there has been no waiver of the attorney-client or work product privilege. See *Dreiling v. Jain*, 151 Wn.2d 900, 918, 93 P.3d 861 (2004) (remanding for trial court to determine whether the attorney-client privilege was waived and therefore whether the otherwise privileged materials could remain sealed under GR 15). Here also, each of the five factors required for a GR 15 order were met. See *Dreiling*, supra.

First, there was "some showing of the need" because protection of privileged attorney-client communications is a ground for sealing a record under GR 15. See 151 Wn.2d at 917-918 (remanding for determination if seal should be lifted because attorney-client privilege was waived by the privilege holder's filing of protected document); *Bank Brussels Lambert*, supra. (because motion papers contained unintentionally disclosed attorney-client communications the Court ordered that previously filed documents could be put "under seal"); *Georgetown Manor, Inc.*, 753 F.Resp. at 939 (ordering "removed . . . and placed under seal" inadvertently disclosed privileged attorney-client communication filed by the opposition). Second, BIAW had "an opportunity to object," *Dreiling*, supra at 914, because it was provided notice of the motion to seal, filed an opposing memorandum, and conducted oral argument. CP 1043; 12/14/08 RP 14-16. Third, "the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened," id., because the one page email was in the record only because of a unilateral act of BIAW without advanced notice and was stricken in its entirety because both the face of the document and the record confirmed it would be privileged and irrelevant. See e.g. *Brussels Lambert*, supra (ordering that "because motion papers . . . contain copies of material held to be privileged, these documents may be filed under seal"); *Georgetown*

*Manor, Inc.*, supra (ordering attorney-client communication filed by opponent "removed . . . and placed under seal.")

Fourth, there were no "competing interests of the parties and the public." *Dreiling*, supra at 914. Indeed, BIAW did not even attempt to claim it had an interest in the email and the public could have no legally cognizable right to a privileged document that should never have been filed without giving defendants an opportunity to take preventative action. See RPC 4.4(b); RCW 42.56.290; RCW 5.60.060(a)(2). This Court in *Dreiling* implicitly accepted the principle that the public has no such interest, and that an order to seal under GR 15 is proper, where -- as here -- the document is privileged and there has been no waiver. See 151 Wn.2d at 918. Finally, the proposed order to seal would have been "no broader in its application or duration than necessary to serve its purpose," id., because only a single one-page document containing very few sentences was sought to be sealed. Hence, it was error not to seal the improperly filed, and already stricken, attorney/client communication.

#### IV. CONCLUSION

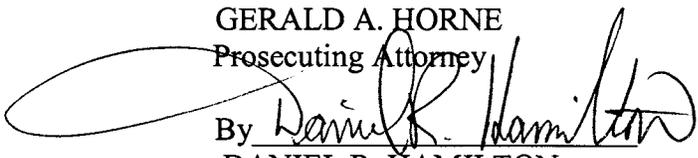
From its filing of a factually and legally baseless complaint naming both Auditor Pat McCarthy and Pierce County as codefendants on a claim nowhere authorized by statute or common law, to this appeal seeking to reverse such orders as those dismissing a claim it agreed it was not pursu-

ing, BIAW consistently conducted this litigation as if the Court's rules do not apply to it, and no one will hold it accountable for its conduct. If the legislature in RCW 4.84.185 and the Court in CR 11 and RAP 18.1 did not intend to discourage such abusive conduct as shown here -- and the resulting needless waste of defendants' and the Court's resources -- it is difficult to imagine what this statute and these rules were intended to prohibit.

Groups with political agendas are certainly entitled to bring colorable actions in the Courts, but they are not above the rules applicable to all litigants when they do so. By filing, litigating, and appealing the instant frivolous claim without reasonable cause and in the improper manner demonstrated above, BIAW grossly violated RCW 4.84.185, CR 11 and RAP 18.1. Accordingly, like every other litigant, BIAW is accountable for its conduct before the Courts and the waste of resources it has caused.

DATED: July 22<sup>nd</sup>, 2008.

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CERTIFICATE OF SERVICE

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

I hereby certify that a true copy of the foregoing <sup>2008</sup> ~~BRIEF OF DEFENDENTS/CROSS APPELLANTS~~ <sup>BRIEF OF RE-SPONDENTS/CROSS APPELLANTS</sup> was delivered this 22nd day of July, 2008, on counsel for Appellant in the manner indicated:  
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