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DIVISION II

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STATE OF WASHINGTON
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NO. 39196-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

KITSAP COUNTY PROSECUTING ATTORNEY'S GUILD; KITSAP COUNTY DEPUTY SHERIFF'S GUILD; KITSAP COUNTY CENCOM EMPLOYEES' GUILD; KITSAP COUNTY SHERIFF SUPPORT GUILD,
Plaintiffs,

-vs-

KITSAP COUNTY, a municipal corporation,
Appellant,

-vs-

THE KITSAP SUN, aka BVR Corp., dba The Kitsap Sun,
Respondent.

-vs-

KITSAP COUNTY PROSECUTING ATTORNEY'S GUILD; KITSAP COUNTY DEPUTY SHERIFF'S GUILD; KITSAP COUNTY CENCOM EMPLOYEES' GUILD; KITSAP COUNTY SHERIFF SUPPORT GUILD, and KITSAP COUNTY,
Defendants.

SECOND CORRECTED OPENING BRIEF OF APPELLANT KITSAP COUNTY

RUSSELL D. HAUGE
Prosecuting Attorney

DEBORAH A. BOE
Deputy Prosecuting Attorney
614 Division Street
Port Orchard, WA 98366
(360) 337-4871

ORIGINAL

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I. INTRODUCTION

Is an employee's town of residence part of the employee's address? This case requires the Court to determine if the taxpayers of Kitsap County should have to pay over $20,000 because the County told a requester that it wanted to take two weeks to evaluate whether or not an exemption for employee addresses applied to a request for employee's town of residence and to notify employees of the request.

After the County was sued by its employees to block disclosure, the requester intervened, and the trial court ruled in favor of the County, the trial court then required the County to pay the intervenor-requester's attorney's fees. This was error and this Court should reverse. Taxpayers should not be punished because of the County's efforts to be transparent and explain its actions to the requester. The County complied with the letter and the spirit of the PRA. Under these circumstances, requiring the County to pay attorney fees would work against the public interest by discouraging open communications and agencies from considering the public's interest in efficient government and the protection of privacy.

The purpose of the Public Records Act is "to allow public scrutiny of government[.]" *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 218, 951 P.2d 357 (1998). As recognized by the Supreme Court in *Bellevue John*

Does v. Bellevue School District,[1] the PRA "seeks to provide people with full access to public records while remaining 'mindful of the right of individuals to privacy and of the desirability of the efficient administration of government.' RCW 42.17.010(11)."[2] When the people enacted the Public Disclosure Act,[3] they expressly recognized that disclosure is not always in the public interest. Sometimes, "[r]equiring disclosure where the public interest in efficient government could be harmed significantly more than the public would be served by disclosure is not reasonable."[4] The Supreme Court has recognized that disclosure harms the public interest when disclosure causes the "the erosion of employee moral[.]"[5]

The PRA seeks to protect employee privacy and prevent the erosion of employee moral with both a general employee privacy exemption (RCW 42.56.230) and a second exemption for specific information about employees: "The residential addresses, residential telephone numbers,

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[1] *Bellevue John Does v. Bellevue School Dist.*, 164 Wn.2d 199, 189 P.3d 139 (2008)

[2] *Bellevue John Does*, 164 Wn.2d at 225 (quoting RCW 42.17.010(11)).

[3] The Public Records Act, currently codified in chapter 24.56 RCW, was originally enacted by the People as part of Initiative 276 in 1972. That initiative, with its public records provisions, was codified in chapter 42.17 RCW. In 2006, the public records portions were removed and recodified in their own chapter, 42.56, which was entitled the Public Records Act. Thus, except when needed for clarity, this brief will refer to the Public Records Act even when an actual case may be citing to the Public Disclosure Act prior to the recodification.

[4] *Id.* (quoting Dawson v. Daly, 120 Wn.2d 782, 798, 845 P.2d 995 (1993).

[5] *Id.*

personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of employees or volunteers of a public agency[.]" RCW 42.56.250(2).

When Kitsap County received a public record request for detailed information about its employees, it promptly provided the following requested information: first name, last name, number of years as a county employee, department the employee is assigned to, the job title, the office phone number and the annual pay rate. CP 6. But the County told the requester that it needed two weeks to consider whether the "town of residence" may be exempt under RCW 42.56.250(2) and to provide notice to its employees pursuant to RCW 42.56.540. *Id.* at 152.

The County's response to the Sun fully complied with the plain language and the spirit of the PRA. The PRA expressly authorizes agencies to delay production to "locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request." RCW 42.56.520. In light of the language of the exemption, it was in the public interest for the County to carefully consider whether the exemption applied and to seek input from its employees.

Before the County made a final decision, within the two week

timeframe, two employee guilds filed a lawsuit against the County to block disclosure.[6] The County immediately notified the requester, the Sun, who then voluntarily sought to join the lawsuit. *Id.* at 56. During the course of the lawsuit, the County did not argue against disclosure or that the records were exempt –instead it took a neutral position.

Nevertheless, after the trial court ruled in favor of the County, and against the guilds, the trial court imposed penalties and attorney fees on the County – for prevailing in the lawsuit. CP 339. The trial court's ruling and reasoning for that ruling are flawed, misconstrue the laws and facts and are harmful to the spirit of the act and taxpayer interests. Therefore, this Court should reverse and instruct the trial court to deny the requester's claim for attorney fees.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR

1. The trial court erred when it found that the Kitsap Sun had prevailed against Kitsap County – as opposed to the guilds – because Kitsap County had allegedly opposed the disclosure of the record.

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[6] Initially, the Sheriff's Deputy Guild and the Prosecutors' Guild filed the injunction, CP 71. Later, CenCom Guild and Sheriff's Civil Guild joined the lawsuit when the parties stipulated to the Sun's intervention, CP 68. For simplicity, "guilds" will refer to these four guilds.

2. The trial court erred when it found that Kitsap County had cited an exemption in its response to the Kitsap Sun's original request for records.

3. The trial court erred when it found that Kitsap County had argued against disclosure of the record in court.

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court abuse its discretion by finding that Kitsap County opposed the Kitsap Sun because it did not object to the guilds' injunction, when Kitsap County did not wrongfully withhold the record and was only prevented from disclosing the record by the trial court's restraining order?

2. Did the trial court abuse its discretion by finding that Kitsap County opposed the Kitsap Sun because it cited a possible exemption during two weeks of deliberation and notification of third parties, when Kitsap County complied with all statutory guidelines and did not unreasonably delay the release of the record?

3. Did the trial court abuse its discretion by finding that Kitsap County opposed the release of records in court when Kitsap County did not oppose disclosure in court, was constrained

from releasing the record by the trial court?

III. STATEMENT OF THE CASE

Kitsap County ("County") received a request from the editor of the Kitsap Sun ("Sun") newspaper for various records concerning all county employees and contractors. CP 147-48. Within two weeks, the County timely supplied all the records except for the request for county employees' town of residence. *Id.* at 6. Instead, the County told the Sun it needed an additional two weeks to deliberate on an exemption and notify its employees of the request. *Id.* at 154-55. Before the County could inform the Sun of its final determination, two guilds filed a preliminary injunction to prevent disclosure of their town of residence to the Sun. *Id.* at 13. This chain of events occurred in exactly one month: from the request on July 21, 2008, to the injunction on August 21, 2008. The Sun intervened in the action, and the trial court ultimately determined that the record was not exempt. *Id.* at 279-87. The County released a record of its employees' town of residences to the Sun. *Id.* at 345.

The County was assessed attorney's fees, costs, and a daily penalty for the entire period because the trial court found that the Sun prevailed against the County, rather than the guilds, because (1) the County "opposed" the disclosure of the record when it cited a possible exemption in correspondence that the County said "may" apply, (2) the County did

not object to the guilds' injunction and (3) the County supposedly opposed disclosure to the Sun in court. *Id.* at 339. The County now appeals the trial court's decision regarding fees, costs, and penalties.

A. FACTS

On July 21, 2008, the editor of The Kitsap Sun emailed the following request to Kitsap County:

> We would like to request the following public records from Kitsap County: A database of county employees, full time and part time, containing fields with the following information:
>
> First name
> Last name
> Town of residence
> Number of years as a county employee
> Department assigned to
> Job title
> Office phone number
> Annual pay rate

CP 147.

The County responded to the original request on July 25, 2008, stating that "[a]ll documents responsive to this request will be reviewed and prepared for release. We hope to release these documents no later than August 8, 2008." *Id.* at 166.

On August 8, 2008, the County released all of the requested information except for its employees' town of residence. *Id.* at 152. The County's August 8, 2008, letter to Mr. Brody stated, in part, the following:

> Enclosed please find records responsive to your request, except that the response does not include employees' town of residence. Under the Public Records Act, residential addresses of public employees and volunteers are exempt from inspection and copying. *See* RCW 42.56.250. It is not clear to the County whether "town of residence" is included within the meaning of "residential address."
>
> The County is taking action to determine whether County employees object to the public release of their "town of residence." If employees consider the release of their town of residence to be a violation of the Public Records Act or an invasion of privacy then the County may file a declaratory judgment action and ask the court to rule whether employees' "town of residence" is exempt from public disclosure.
>
> A copy of a letter sent to employees is enclosed. As the letter indicates, employees are asked to respond by August 18, 2008. By August 20, 2008, the County will make a determination and notify you whether it intends to file a declaratory judgment action.

On August 8, 2008, the County notified its employees by email of the request by the Kitsap Sun for their town of residence, and explained how to register any objections to the release of the information by August 18, 2008. *Id.* at 154-55. In addition, the County explained that it would "evaluate employees' objections, if any, and consult with the Prosecutor's Office," and that "if there are no objections, then the information will likely be released." *Id.* The County received over 200 objections from employees, many with compelling reasons regarding their personal safety because of their work within the County and others because of personal reasons. *Id.* at 33-35.

In the meantime, Mr. Brody sent an email on August 15, 2008, alleging that the County had not complied with its obligations. The County acknowledged those duties but clarified that the

> "Act also allows the agency additional time to notify third persons affected by the request or to determine whether any of the information requested is exempt and that a denial should be made to all or part of the request. *See* RCW 42.56.520.
>
> On August 8, 2008, we responded to your request for records by submitting the records you requested, except that the response did not include employees' town of residences. In the letter we explained that the County was taking additional time to notify employees of your request for their town of residence. In addition, because we believe that employees' town of residence is exempt under RCW 42.56.250 and RCW 42.56.210(2),, input from employees will help us determine whether the County should take action under RCW 42.56.210(2), RCW 42.56.540, and/or chapter 7.24 RCW. As indicated in our August 8 letter, we will notify you by August 20, 2008 whether the County intends to seek judicial review.

CP 65.

The County offered again to release the town of residences of its employees in the aggregate, but the Sun did not accept the offer. *Id.*

B. Procedure

On August 21, 2008, two county guilds filed a Petition for Declaratory Judgment and Injunctive Relief requesting an order that "County employees' town of residence is exempt from disclosure under RCW 42.56" and to enjoin the County from releasing the information. *Id.* at 3. On the same day, the County notified the Sun of the guilds' lawsuit. *Id.* at 56. Later, two other guilds joined the first in the action. *Id.* at 68.

On August 25, 2008, the County answered to the guilds' petition that it had "no objection to Plaintiff's Motion for Summary Judgment and Injunctive Relief." *Id.* at 167-68.

On September 15, 2008, the guilds filed a Motion for Summary Judgment that was scheduled for a hearing on October 13, 2008, before a visiting Judge. *Id.* at 13.

On September 18, 2008, the Sun made a Motion to Intervene that was stipulated to by all parties. *Id.* at 66. The Sun's Motion to Intervene listed three purposes: 1) to protect its interest, 2) to oppose the guilds' injunction, and 3) to obtain disclosure of the record. *Id.* at 42. The Sun's intervention was stipulated to by all parties on October 8, 2008, and the trial court changed the hearing date to November 7, 2008. *Id.* at 66. The Sun filed its Complaint to Enforce the Public Records Act on October 14, 2008, and its Motion for Summary Judgment on October 17, 2008. *Id.* at 69, 76.

Extensive briefing was exchanged between the guilds and the Sun regarding whether "town of residence" was exempt from the Public Records Act under three theories: 1) that it is not a public record under RCW 42.56.010(2), 2) that it is exempt as a residential address under RCW 42.56.250, and 3) that it is personal information under RCW 42.56.230(2). *Id.* at 13.

The County submitted its responsive brief to the Sun only in regards

to attorney fees and penalties, and made no argument concerning the exemptions. *Id.* at 156. The County presented two issues in response to the Sun's Motion for Summary Judgment. First, "[w]hether the County met the statutory requirements under the Public Disclosure Act when it informed the Kitsap Sun that it was not releasing records in order to notify employees of the request and determine whether the 'town of residence' is exempted under RCW 42.56.250." Second, "[w]hether the County should be assessed penalties and attorney fees if Intervener prevails when County met the statutory requirements under the Public Disclosure Act, and Intervener would prevail against Plaintiffs, not the County." *Id.* at 157.

On November 7, 2008, the parties appeared before the Honorable Judge Verser in Kitsap County Superior Court. *Id.* at 280. The guilds and the Sun argued before the court regarding whether "town of residence" is exempt from disclosure. RP 2-29. The County argued only concerning attorney fees. *Id.* at 30-41. On November 25, 2008, the trial court granted the Sun's Motion for Summary Judgment and denied the guilds' Motion for Summary Judgment. CP 279. The trial court requested additional briefing regarding attorney fees and penalties from the Sun and the County. *Id.* at 287. The County released the record to the Sun pursuant to the trial court decision. *Id.* at 345.

The County and the Sun submitted additional briefing on attorney fees

and penalties at the end of December, 2008. *Id.* at 337. On February 18, 2009, the trial court issued its opinion awarding attorney's fees, costs, and penalties to the Sun. *Id.* at 336-42.

III. SUMMARY OF ARGUMENT

A prevailing party is entitled to fees and penalties if the records were wrongfully withheld at the time of the request. *Spokane Research & Defense Fund v. City of Spokane,* 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005). Consequently, if the County did not wrongfully withhold records prior to the guilds' injunction to prevent release of the records, then it clearly did not wrongfully withhold records when it was prevented by the trial court from doing so. *The Confederated Tribes of the Chehalis Reservation v Johnson,* 135 Wn.2d 734, 757, 958 P.2d 260 (1998).

The County never wrongfully withheld records and the trial court could not have ruled that the County erred in not immediately producing the records. RCW 42.56.520 provides clear timelines for an agency's response to public disclosure requests and expressly authorizes an agency to take additional time to deliberate on an exemption and notify third parties. There is no dispute that the County adhered to all the statutory guidelines by responding within five days of the original request, providing reasonable estimates of time for disclosure, providing all other records within the estimates of time, and notifying affected third parties. Instead, the trial court

erroneously found that the County's citation of an exemption in correspondence prior to the injunction to be an improper withholding of the record.

After the injunction was filed against the County, the only "wrongful" action would be to disclose the record; therefore, the trial court's finding that the County wrongfully withheld a record by not taking a position on the injunction must be error. In *Bellevue John Does 1-11 v. Bellevue School District #405,* 129 Wn.App. 832, 864-67, 120 P.3d 616 (2005), the appellate court reinforced the rule in *Confederated Tribes* that an agency is not subject to fees when it is prevented from disclosing the record. *Confederated Tribes,* 135 Wn.2d at 757. In addition, the trial court erroneously found that the County argued against disclosure in court. Not only is this a factual error, but also is contrary to the holding in *Bellevue John Does* and a violation of CR 11 and the intent of the PRA.

The Sun is a prevailing party against the guilds, not the County, Moreover, the County prevailed in the injunction; it was sued and those claims were dismissed. The County complied with statutory disclosure guidelines, provided reasonable estimates of time to disclose the record, notified affected third parties, and was prepared to release the record or seek judicial review. The County never wrongfully withheld the record but was prevented from doing so by the trial court. Therefore, because the Sun and the

County prevailed against the guilds, the County should not be assessed fees, costs, and penalties.

IV. ARGUMENT

A. STANDARD OF REVIEW

An appellate court reviews a trial court's decision on summary judgment *de novo*, and engages in the same inquiry as the trial court. *Troxell v. Rainier Public School Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005), *citing Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004).

Before a trial court can rule against a party on summary judgment, it must view the evidence in the light most favorable to that party and still find that no genuine issue of material fact exists. CR 56(c).

In this case, the County was sued by the guilds and the County prevailed when the trial court dismissed the guild's claims and dissolved the temporary restraining order the guilds had obtained against the County. But as part of this summary judgment proceeding, the trial court also made a factual finding adverse to the County by finding that that the County "opposed" disclosure. Based on this adverse factual finding, the trial court ordered the County, who prevailed, to pay the requester's attorney's fees and penalties. Because this factual determination was made as part of the summary judgment proceeding, all inferences should have been made in favor of the

County. When reviewing that factual determination on appeal, this Court must consider the evidence in the light most favorable to the County.

B. KITSAP COUNTY SHOULD NOT BE ASSESSED FEES AND PENALTIES WHERE THE GUILDS OPPOSED THE DISCLOSURE OF THE RECORD AND BROUGHT AN ACTION TO PREVENT, RATHER THAN COMPEL DISCLOSURE.

A prevailing party is entitled to fees and penalties only when the agency wrongfully withholds the record. *Spokane Research,* 155 Wn.2d at 103-04. RCW 42.56.550 provides for attorneys fees:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees. . .

"The 'prevailing' relates to the legal question of whether the records should have been disclosed upon request." *Spokane Research,* 155 Wn.2d at 103. The court's role is to determine whether an agency improperly withheld a record at the time of the request and therefore violated the PRA. *Id.* at 101-02.

Once a third party has obtained a court order preventing an agency from disclosure records, the agency does not "wrongfully" withhold a record by complying with that order and therefore is not subject to attorney fees and penalties – the Supreme Court's opinion in *Confederated Tribes* makes it absolutely clear that RCW 42.56.550(4) is <u>not applicable</u>

> to cases in which an individual - rather than the agency - opposes disclosure of the records, and where the action was brought to prevent,

> rather than compel, disclosure. (citation omitted) This interpretation is consistent with the purpose of the attorney fees provision, which is to encourage broad disclosure and to deter agencies from improperly denying access to public records.

135 Wn.2d at 757.

Relying on RCW 42.56.520, the County took an additional two weeks to determine whether the record was exempt and to notify employees. If the Sun thought this time period was unreasonable, it could have filed suit under RCW 42.56.550(2). But no one has challenged the County's time estimate so the County cannot be found to have wrongfully withheld the record during those two weeks. And once the guilds obtained an order prohibiting the County from releasing the records, the County had to withhold the record. Whether the County believed an exemption applied after the order was entered is irrelevant because the County could not have disclosed regardless of its position, or lack of one.

Although the County did not oppose disclosure any more than in *Confederated Tribes* and *Bellevue John Does*, the trial court stated that it "feels the County is reading the holdings . . . too broadly" because the agencies "involved did not oppose the requested disclosure." CP 339. The trial court states that the County "opposed disclosure" because it cited an exemption in correspondence to the Sun, did not object to the guilds' injunction, and argued against disclosure in court. *Id.* None of these "oppositions" is supported in law or fact and will be discussed at length

below.

Finally, the trial court finds it "necessary to award attorney's fees and a sanction in this case 'to encourage broad disclosure and to deter agencies from improperly denying access to public records.'" *Id.* However, the appellate court in *Confederated Tribes* held that not awarding fees is consistent with the purpose of the fees to encourage broad disclosure and deter agencies from improperly denying records. 135 Wn.2d at 757. In other words, imposing fees when the agency did not deny a record, but was prevented from disclosing a record serves no useful purpose under the PRA, and even violates the purpose of the PRA. Therefore, sanctioning the County in this case will serve to deter public agencies from notifying third parties, deliberating when exemptions apply, seeking judicial review, and most importantly, following the PRA provisions to avoid sanctions.

1) The Court of Appeals has already considered and rejected the trial court's finding that attorney fees should be imposed when the agency "opposes" disclosure.

The Court of Appeals in *Bellevue John Does* considered the same "opposition" argument from the requester's counsel and not only rejected it, but sanctioned the requester because the motion for fees was "not warranted by existing law or a good faith argument." 129 Wn. App. at 866. The Seattle Times was not awarded fees because it prevailed against the teachers, not the districts, and any "opposition" by the districts was immaterial. *Id.* The Sun

cannot profess ignorance of this law given that it was the Sun's attorneys who were sanctioned in the *Bellevue John Does* case.

In *Bellevue John Does,* the Seattle Times made a public disclosure request of three school districts for records of teachers accused of sexual misconduct. *Id.* at 838. The districts notified the affected teachers who filed an injunction preventing the disclosure of their records based on RCW 42.17.310(b) for "personal information in files . . . of any public agency to the extent that public disclosure would violate their right to privacy." *Id.*

Because the Times was not awarded attorney fees at the trial court level, it moved to vacate the order because of "newly discovered evidence that consisted of internal e-mails and other statements by district administrators tending to show that the district administrators sympathized with the teachers and had strategized with them about how disclosure could most effectively be resisted." 129 Wn. App. at 865. The appellate court denied the Times' motion because "there was no evidence that any such hostility actually delayed the Times in obtaining copies of public records to which it was entitled. *Id.* at 865-66. "The legal proceedings were instigated by the teachers, not the districts, and during the proceedings the school districts were not adverse parties to the Times." *Id.* at 866.

Likewise, in this case, the County's actions – even if characterized as opposition –did not delay the Sun in obtaining copies of the records. Any

delay beyond that allowed by RCW 42.56.520 was caused by the legal proceedings instigated by the guilds against the County. The County did not file suit and was not even adverse to the Sun during the proceedings. In addition, the Sun's Motion to Intervene was to "1) protect its interests, 2) oppose the injunction sought by . . . Guilds, and 3) bring the Kitsap Sun's claim to obtain disclosure. . ." CP 42. In addition, the Sun argued in its Motion for Summary Judgment that the guilds were the party resisting disclosure. *Id.* at 219. The guilds and the Sun were the parties who argued about disclosure of the record, not the County.

The primary case the Sun cited to the trial court in support of its claim for fees against the County was *Doe I v. Washington State Patrol,* 80 Wn. App. 296, 980 P.2d 914 (1996). The Sun completely failed, however, to inform the trial court of the treatment that case received in *Bellevue John Does*. Why? As the Court of Appeals held in *Bellevue John Does, Doe I v. Washington State Patrol* does not support the Sun's argument because *Doe I* "is not on point and does not help the Times. The pivotal fact in that case - the State Patrol's delay and failure to comply with statutory time deadlines - is not present here."[7] *Id.* In fact, no court in Washington has awarded fees under the PRA when an agency has been prevented from disclosing a record by the trial

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[7] The State Patrol notified the third party, but never did respond to the requestor except to send a copy of the notification two months later. *Id.* at 298.

court because it "opposed" the disclosure.

Bellevue John Does is entirely on point and factually similar to this case, although its holding regarding the "opposition" argument has been studiously ignored by the Sun and the trial court. The Sun's argument that the County "opposed" disclosure and therefore the Sun prevailed over the County has been soundly rejected by *Bellevue John Does* when the Sun's counsel made the same argument. Consequently, the Sun's argument should be rejected in this case as well.

2) The court cannot mandate that an agency must actively argue for disclosure regardless of the exemption at issue without putting the agency at risk for violation of CR 11 or improper disclosure of records.

This Court should reject the trial court's finding that the County's lack of objection to the guilds' injunction is a basis for awarding fees because such a rule would work directly against the purpose and the spirit of the PRA and is not supported in case law. See RCW 42.17.010(11) (emphasizing openness, privacy and efficient government as the purposes of the law). The Sun argued that the "critical fact" in *Bellevue John Does* was that the districts took the "position in court that the records were indeed disclosable." RP 39. Although, in *Bellevue John Does*, the appellate court did state that the districts did not oppose disclosure in court, it did not require the districts to advocate for disclosure.

Additionally, in its Motion for Summary Judgment, the Sun stated that "sitting out is not an option" for the County, relying on *Doe I* where the State Patrol argued that it was merely a stakeholder without a position as to disclosure. CP 103. However, in *Doe I,* the appellate court did not consider the agency's stakeholder argument and assessed fees because of its violation of the PRA, not its position or lack of one. 80 Wn. App. at 303. The appellate court in *Bellevue John Does* affirmed that the agency's lack of adherence to statutory guidelines was the pivotal fact, not the agency's position. 129 Wn. App. at 867. *Doe I* is an example of an agency paying fees because it improperly withheld a record, unlike *Bellevue John Does* and this case, where the agency did not wrongfully withhold the record.

A court cannot mandate that an agency take a position that the record is disclosable or risk sanctions without serious ethical consequences. Either the agency must advocate for disclosure to avoid sanctions, or risk being sanctioned because it had no good faith basis for its position.

CR 11 states that an attorney's signature

> constitutes a certificate by . . . the attorney that the . . . attorney has read the pleading, motion, or legal memorandum, and that to be best of the . . . attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: 1) it is well grounded in fact; 2) it is warranted by existing law or a good faith argument . . . 3) it is not interposed for any improper purpose.

Under the trial court's reasoning, the County would have to argue that

a record is disclosable regardless of whether there is law or fact to support its position in order to avoid sanctions under the PRA. Avoiding attorney's fees is an improper purpose for an agency's position under CR 11.

Therefore, the County's neutral response is the only ethical and reasonable choice and does not unreasonably delay the release of the record. Moreover, the County was neutral on the issue of the exemption with all parties, to wit, it did not object to the Sun's intervention or object to the Sun's arguments for disclosure. CP 66, 156.

In this case, and as in *Bellevue John Does*, the records request was a case of first impression. No Washington case has addressed whether "town of residence" is exempted as a "residential address," and the PRA does not define "residential address." The guilds argued not only the exemption for "residential address," but also the exemption as "personal information", and finally that employees' towns of residences is not a public record that relates to the conduct of government. CP 13. The amount of briefing exchanged between the Sun and the guilds demonstrates that this is not a settled issue.[8] The County did not object to the guilds' injunction as it presented a good faith argument as to why "town of residence" may be exempt. Requiring an agency to actively argue for a position that may not be supportable in law or fact is

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[8] The Sun and the guilds were the parties exchanging multiple briefings on the issue of the exemption. CP 302.

unethical and a violation of CR 11.

Second, requiring an agency to argue for disclosure regardless of the request would encourage improper disclosure of records and harm the public interest. In *Ameriquest Mortgage Company v State Attorney General*, 148 Wn.App. 145, 157, 199 P.3d 468 (2009), the agency did not notify the affected third parties and argued that the records were disclosable; the same process that the trial court would require in this case. But, in *Ameriquest*, the appellate court held that the records were exempt, and remanded the case to include the third parties who had a right to represent their interests in court. *Id.* Exemptions in the PRA are to be construed narrowly, but the court cannot require that agencies ignore them altogether in order to avoid sanctions. To require otherwise would potentially violate third parties' rights to privacy and nullify the statutory exemptions.

3) The trial court was mandated to follow the law, whatever position the County took.

Underlying the trial court's ruling appears to be the trial court's concern that "without any opposition to the requested injunction, it is not likely that the result would have been the same." CP 339. This concern is misplaced for two reasons. First, the court owes no deference to the agency's interpretation of the exemption. "The court is the proper body to determine

the construction and interpretation of statutes," not the agency. *Hearst Corporation v. Hoppe*, 90 Wn.2d 123, 130, 580 P.2d 246 (1978). The trial court is charged with interpreting statutes, not the County, so the trial court cannot use the County's neutral position as a basis for finding that the Sun's intervention was necessary for disclosure of the record.

Second, the trial court's concern is really related to the question of whether a requester is a necessary party in a third-party PRA lawsuit. Division III of the Court of Appeals recently held that the requester is not a necessary party. *See Burt v. Dep't of Corrections*, 141 Wn. App. 537, 170 P.3d 608 (2007). The Supreme Court accepted review of this case and heard oral argument on January 20, 2009. Thus, the Supreme Court will address the issue of whether a requester is a necessary party, which will address whether an opposition is required. But here, the Sun intervened and was able to fully test the guilds' position. The PRA does not require such an opposition from the County, which may for any number of reasons not assert a position, even if the County believed the better legal argument was that the records were exempt.

The County did not wrongfully withhold the record because it took two additional weeks pursuant to RCW 42.56.520 to deliberate on the exemption and notify employees. Additionally, after the injunction was filed, the County's neutral position was the only position it could have taken

without violating CR 11 and the privacy interests of its employees. Therefore, the trial court erred when it found that the County improperly withheld the record and imposed fees and penalties.

C. KITSAP COUNTY'S CITATION OF A POSSIBLE EXEMPTION IN CORRESPONDENCE IS ENTIRELY CONSISTENT WITH THE LETTER AND THE SPIRIT OF THE PRA, AND IS NOT A WRONGFUL WITHHOLDING OF A PUBLIC RECORD.

The purpose of the Public Records Act is "to allow public scrutiny of government[.]" *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 218, 951 P.2d 357 (1998). As recognized by the Supreme Court in *Bellevue John Does*, the PRA "seeks to provide people with full access to public records while remaining 'mindful of the right of individuals to privacy and of the desirability of the efficient administration of government.'" 164 Wn.2d at 225 (quoting RCW 42.17.010(11)). Disclosure is not always in the public interest. RCW 42.17.010. That is why the people and the legislature have enacted over 30 separate statutory exemptions to the PRA.

In recognition of the agency's delicate position carrying out the mandate of RCW 42.17.010(11) by considering the privacy needs of its employees when determining if disclosure is required and in the public interest, the PRA specifically allows agencies additional time to "determine whether any of the information requested is exempt." RCW 42.56.520. The current request for employees' towns of residence is exactly the type of

request that requires additional time to determine if an exemption applies.

The Sun did not file suit to challenge the County's need to take an additional two weeks to deliberate on whether the "town of residence" is a public record under RCW 42.56.010(2), personal information under RCW 42.56.230(2), or a residential address under RCW 42.56.250(3). The trial court did not find that this was a wrongful withholding of the record. Based on these facts alone, where no record has been "wrongfully withheld," there is no basis to award fees against the County. The PRA does not provide for fees simply because the County "cited an exemption in response to the original public records request". CP 339.

In its letter to the Sun on August 8, 2008, the County did not assert that the requester information was exempt or tell the Sun that it would not provide the records based on any exemption. Instead, the County told the Sun that it is "not clear" if the information requested is exempt under RCW 42.56.250 and it needed two weeks to determine how it would respond. Before the County made a determination on the exemptions, the guilds filed suit to prevent disclosure. *Id.* at 4. The trial court's finding that the County's citation of a possible exemption in correspondence is an improper denial of public records is not supportable, nor is it consistent with the policy of the PRA.

Inexplicably, the trial court relies on the fact that "there is no

indication in those cases that the City of Yakima, the Gambling Commission, or Bellevue School District cited an exemption in response to the original public disclosure request." CP 339. Not only does the trial court engage in a faulty comparison of facts not in the record, but also fails to note that in *Bellevue John Does,* the districts actively opposed disclosure without being assessed fees. 129 Wn. App. at 865-67. Citation of an exemption in correspondence cannot be more of an "opposition" than being openly hostile to the disclosure. Moreover, the trial court's ruling will work against the spirit of the Public Records Act by discouraging agencies from giving details about what exemptions it is considering.

1) The trial court's finding that citing a possible exemption to a requester is an improper denial would render provisions for notification and deliberation meaningless.

The County never denied or wrongfully withheld records from the Sun. Instead, the County took only two additional weeks to notify County employees, read over 200 objections, and consider whether to seek judicial review or release the record. CP 34. The County did not improperly deny the requested record, but complied with the letter and the spirit of the PRA.

It is a "fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of same." *Taylor v. City of Redmond,* 89 Wn.2d 315, 318, 571 P.2d 1388 (1977). If a public agency will be found in

violation simply because it has notified affected third parties and considered whether a particular exemption applies to a request, then the provisions for notification and deliberation are meaningless.

The notification provision is not, however, meaningless. The Court of Appeals recently reversed and remanded a case with instructions to notify affected third parties. *Ameriquest,* 148 Wn. App. at 156-57. The court points out the hypocrisy of the parties' arguments:

> Throughout briefing and oral argument, all parties profess a deep desire to protect the personal information of the individuals whose Ameriquest loan files are at issue. Surprisingly, though, these individuals neither have been contacted nor made aware of this tug of war over their confidential information, nor have they been invited to represent their interests before the trial court. *Id.*

Notification is necessary so that the affected third parties may represent their interests before the trial court. Indeed, proceeding without the affected third parties can be error. The County notified employees of the request and explained that the exemption for "residential address"[9] may include their "town of residence." CP 154-55. Likewise, the County communicated to the Sun that it was not clear if an exemption under "residential address" applied to the request. *Id.* at 152. Including a particular exemption in its communication aided all the parties in understanding the reason for notification and deliberation, and was not an improper denial of a record.

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[9] RCW 42.56.250

Although the PRA does not specify how much "additional time" is reasonable, courts have found one to two months to be reasonable. In *Confederated Tribes* and *Bellevue John Does* the public agencies spent a month or more deliberating and notifying affected third parties without incurring any fees or penalties because the courts found that the delay was reasonable.[10] Likewise, the County took only two weeks to notify employees and deliberate on the exemptions, and therefore did not unreasonably delay the release of records.

2) Citing an exemption while taking time to determine if it applies is consistent with the policy of the PRA by allowing the other party to consider whether to seek judicial review.

The County communicated to its employees as well as the Sun that it might seek judicial review of the exemptions at issue if it does not disclose the record. The trial court found that the County should be sanctioned for citing a possible exemption even though the Sun was aware of the exemption even before the County was. CP 150. Nevertheless, open communications between the public agency and the requestor is entirely consistent with the PRA, and it is therefore inconceivable that the legislature acknowledge that an agency needs to take additional time to deliberate on an exemption, but consider the

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[10] *Confederated Tribes,* 135 Wn.2d at 758 (holding that the requestor is not entitled to attorney's fees because of the one month delay by the agency while it notified the third parties); *Bellevue John Does,* Wn. App. at 867 (holding that the delay of one to two months that the districts withheld the records is allowed by RCW 42.17.320 and reasonable based on a recognition of that right)

citing of a possible exemption during the additional time as an improper denial.[11]

The County should not be found in violation of the PRA because it cited an exemption that might apply while it was considering whether to disclose or seek judicial review. Requiring that the agency withhold any particularities of its deliberation from the requestor, or even affected third parties, is not consistent with the letter or spirit of the PRA, is not supported by case law, and deters agencies from openly communicating with the public regarding records.

D. KITSAP COUNTY DID NOT OPPOSE THE DISCLOSURE OF THE RECORDS IN COURT AND EVEN IF IT HAD, THE SUN STILL PREVAILED AGAINST THE GUILDS, NOT THE COUNTY.

In *Bellevue John Does,* the districts lack of opposition in court was one factor of many, all of which are also present in this case: the agency complied with statutory deadlines, provided reasonable estimates of time, notified affected third parties, did not unreasonably delay disclosure of the records, and was prepared to disclose the record until constrained by an injunction.

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[11] *See also, Rental Housing Association of Puget Sound v. City of Des Moines,* 165 Wn.2d 525, 540, 199 P.3d 393 (2009) (holding that "the opportunity for meaningful judicial review of a claim of exemption requires specific identifying information to support a claim.")

Therefore, the County's supposed opposition in court is the only factor distinguishing it from *Bellevue John Does*, and therefore, the only basis for the trial court to award attorney's fees to the Sun.[12] However, a review of the record will confirm that the County did not oppose disclosure of the record before the trial court, so the basis for the distinction is null. Moreover, even if the County had argued against disclosure in court, that is not a basis for awarding fees.

1)The County did not argue against disclosure of the home town information before the trial court.

The trial court erred in stating that the County argued against disclosure before the trial court. After lengthy arguments regarding the exemptions between the guilds and the Sun, the County addressed the attorney's fees issue.

> Mr. Tornabene: Your Honor, my understanding is Ms. Boe is addressing I guess some more distinct issues.
> The Court: Attorney's fees. RP 29.
> ---
> Ms. Boe: And as I mentioned earlier, I am here not taking a side in this issue except in terms of the County, and if the court would find that the record was disclosable, the County would ask that no penalties or attorney's fees be assessed. RP 30.

The trial court questioned the County about its intention in disclosing

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[12] The courts in *Bellevue John Does* and *Confederated Tribes* did not consider whether citing an exemption in correspondence, or not objecting to an injunction were "opposition to disclosure."

the record, and the County explained that it had not determined whether to disclose the record when the guilds filed an injunction:

> The Court: The County wasn't going to disclose it anyway, though, right?
> Ms. Boe: Were we going to disclose it anyway?
> The Court: The County wasn't going to give out the information. That's what - -
> Ms. Boe: We were going to notify employees . . . RP 32-33.

In response to the Sun's primary argument that the County must object to the guilds' injunction, the County responded that it "did not object because we believe it's a reasonable argument that the union is making for exemption" and it would be a violation of CR11 to require the County to use "magic words" to avoid attorney's fees. RP 41. The County never mentioned the exemptions at issue or argued for or against disclosure. Stating that the guilds' argument for exemption is reasonable in the context of an argument about attorney fees is not the same as an argument opposing the disclosure of the record.

2) Even if the County had argued against disclosure in court, the Sun still prevailed against the guilds, not the County.

Even if the County had advocated against disclosure in court, the critical factor is that the County was restrained from releasing the record by the trial court. The Sun prevailed against the guilds, not the County, and the County should not be assessed fees and penalties even if it had argued against disclosure of the record in court.

In *Bellevue John Does,* a district filed a brief advocating against disclosure of letters of direction. 129 Wn. App. at 867. Even though the district formally opposed disclosure of the records in court, the appellate court stated "[n]evertheless, Federal Way and the other districts compiled the records and were prepared to release them if the trial court had not restrained them from doing so. Thus in the court action, the Times prevailed against the teachers, not the districts." *Id.* Therefore, the appellate court in *Bellevue John Does* held that the requestor prevailed against the party filing the injunction even when the agency formally opposed the disclosure of the records in court.

The County responded to the original request on July 25, 2008, stating that "[a]ll documents responsive to this request will be reviewed and prepared for release." CP 166. The County was prepared to release the document after it had notified employees of the request. The County was then restrained by the trial court from releasing the record. Therefore, the Sun prevailed over the guilds regardless of the County's position or lack of position. Moreover, the County prevailed over the guilds because the injunction was dismissed.

The trial court erred in finding that the County argued against disclosure in court. And even if the County had argued against disclosure, the critical fact is the Sun prevailed against the guilds. Therefore, the County's alleged "opposition" in court is in error and not material to the issue of attorney fees and penalties.

I. CONCLUSION

The taxpayers of Kitsap County should not have to pay over $20,000 in attorney fees and penalties because Kitsap County took an additional two weeks pursuant to RCW 42.56.520 to determine whether "town of residence" is part of the exemption for "residential address" and to notify County employees of the request. Because the County never wrongfully withheld the record nor opposed disclosure of the record, the Court should reverse the trial court's order that the County must pay attorney fees and penalties.

DATED November 4, 2009.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

DEBORAH A. BOE WSBA #39365
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On November 4, 2009, I caused to be served in the manner noted a copy of the foregoing document upon the following:

Greg Overstreet
Michele Earl-Hubbard
Allied Law Group, LLC
2200 6th Avenue, Suite 770
Seattle, WA 98121

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[ ] Via Personal Service/Hand Delivery/Legal Messenger

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

DATED November 4, 2009, at Port Orchard, Washington.

Tracy L. Osbourne
Kitsap County Prosecutor's Office
614 Division Street, MS-35A
Port Orchard, WA 98366
(360) 337-5776
tosbourn@co.kitsap.wa.us