

3196-1-II
NO. 35313-0-H

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.

FILED
COURT OF APPEALS
DIVISION II
09 OCT 15 PM 2:26
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

CORRECTED REPLY 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

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. INTRODUCTION1

II. STATEMENT OF THE CASE4

Clarifications of Fact from Respondent’s Brief.....5

 1. Ms. Aufderheide never directed the County not to disclose the employees’ town of residence5

 2. Deputy Civil Prosecutors are not members of the Deputy Prosecutor’s Guild.....6

III. ARGUMENT7

 A. The Trial Court Erred in Finding that the County Argued Against Disclosure in Court.....7

 B. Citing Two Exemption Under Deliberation to a Requestor is Consistent with the Letter and the Spirit of the PRA8

 C. A Party Who Intervenes After the County Has Been Ordered to Not Release a Record Cannot Then Collect Attorney’s Fees for Prevailing12

 1. This case is not distinguishable from *Bellevue John Does* but is distinguishable from *Doe I*.....14

 2. The Sun’s status as a prevailing party does not make an award of fees mandatory under *Spokane Research*.....17

 D. The Court Cannot Mandate the County’s Position on a Lawsuit Without Being in Violation of CR 1119

IV. CONCLUSION.....19

TABLE OF AUTHORITIES

Cases

<i>Ameriquest Mortgage Company v State Attorney General</i> , 148 Wn.App. 145, 199 P.3d 468 (2009).....	11
<i>Bellevue John Does 11 v. Bellevue School Dist.</i> , 164 Wn.2d 199, 209, 189 P.3d 189 (2008).....	13
<i>Bellevue John Does 1-11 v. Bellevue School District #405</i> , 129 Wn.App. 832, 120 P.3d 616 (2005).....	4, 7, 14, 15, 16, 17, 18
<i>Doe I v. Washington State Patrol</i> , 80 Wn. App. 296, 980 P.2d 914 (1996).....	14, 16, 17
<i>Spokane Research & Defense Fund v. City of Spokane</i> , 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005)	1, 17, 18
<i>State v. Depaz</i> , 165 Wash.2d 842, 858, 204 P.3d 217 (2009)	1, 7
<i>The Confederated Tribes of the Chehalis Reservation v Johnson</i> , 135 Wn.2d 734, 958 P.2d 260 (1998).....	2, 3, 15, 16, 17

Statutes and Regulations

RCW 42.17.010(11).....	13
RCW 42.56.520	1, 8, 9, 12, 13, 19
RCW 42.56.540	2
CR 11	19
CR 56(c).....	5
WAC 44-14-04003(3).....	9
WAC 44-14-04003(11).....	3, 8, 10
WAC 44-14-06002(1).....	8

I. INTRODUCTION

Reversal and remand is mandated because the trial court's decision to award the Sun Attorney fees is based on a critical factual error. A court abuses its discretion when its decision rests on facts unsupported by the record. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009).

Here, the trial court awarded the Sun attorney fees because the County "argued against disclosure of the home town information before this court." CP 339. This is untrue. As the transcript proves, Kitsap County did not assert a position when the trial court was ruling on the merits of whether the records were exempt. RP 30. Because the trial court's decision to award attorney fees was based on a factual error, the trial court abused its discretion and this Court must remand.

Remand is also mandated because the County never wrongfully withheld records from the Sun, so the Sun did not "prevail" against the County.¹ The County initially authorized a delay in production of the record to determine whether an exemption applies and to give notice to third parties. RCW 42.56.520. Moreover, the PRA allows a third party to seek an

¹ See *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005) (allowing fees only if records are "wrongfully withheld").

injunction. RCW 42.56.540. “Implicit in the statutory right to seek an injunction to prevent disclosure is a realistic opportunity to apply to the trial court for such an injunction.”² The County cannot have “wrongfully” withheld the records during this period that is authorized by statute.

When this period expired, the Guilds obtained an injunction that prohibited the County from releasing the records. The County could not have “wrongfully” withheld the records when it was complying with a court order.

Once the injunction was lifted, the County released the records. Therefore, at no time was the County wrongfully withholding records, so there is no basis for finding that the Sun prevailed against the County.

The Sun’s two bases for arguing that it prevailed are nothing more than the Sun creatively trying to avoid the dictates of *Confederated Tribes of Chehalis Reservation v. Johnson*,³ where the Supreme Court ruled that a requester cannot obtain fees from an agency that is prohibited from releasing records because of a third-party injunction. But both of the orchestrated grounds do not justify requiring taxpayers to pay for the Sun’s lawsuit.

First, the Sun says it prevailed because the County cited an exemption

² *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998)

³ 135 Wn.2d 734, 958 P.2d 260 (1998)

that seemed to make the requested records exempt. First, the Model Rules state that “an agency should have a reasonable belief that the record is arguably exempt.” WAC 44-14-04003(11). So the fact that the County thought the requested information – the employee’s towns of residence – was part of the employee’s address cannot create liability. Moreover, the County only expressed its opinion in direct response to the Sun's statement that the County was not fulfilling its duty under the PRA. CP 158. The Sun would have this Court re-write the Public Records Act (“PRA”) to penalize public agencies, and thereby taxpayers, for openly communicating with the requestor and third parties affected by the request. Thus, the Sun cannot in good faith argue that the County should have to pay attorney fees for complying with the Sun’s request for more transparency.

The Sun’s second justification for fees is that it filed its own claim against the County for not disclosing the records, rather than just intervening. But it filed that claim while an injunction was in place prohibiting the County from releasing the records. Under the Sun’s theory, a requester could file a lawsuit any time a third-party injunction is in place and get attorney fees if that injunction is lifted. That would make the Supreme Court’s holding in *Confederated Tribes* meaningless. The Kitsap Sun requested a record that was arguably exempt and likely to be objected to by the affected parties,

waited for an injunction to be filed to stop disclosure before it intervened, then claimed the County acted improperly by withholding the record. The Kitsap Sun's "prevailing party" argument was soundly defeated in *Bellevue John Does*⁴, and that case is not distinguishable from this one.

II. 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. During this two week period, Mr. Brody, the editor of the Kitsap Sun, emailed the County stating his belief that the County was not fulfilling its duties under the PRA. *Id.* at 65, 158.

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. The County notified the Sun of the

⁴ *Bellevue John Does 1-11 v. Bellevue School District #405*, 129 Wn.App. 832, 120 P.3d 616 (2005) ("*Bellevue John Does*")

injunction the day it was filed. *Id.* at 43, 45. The Sun intervened in the action a month later, and the trial court ultimately determined that the record was not exempt. *Id.* at 279-87.

Clarifications of fact from Respondent's Brief

1. *Ms. Aufderheide never directed the County not to disclose the employees' town of residence.*

Mr. Brody, then editor of the Sun, claimed that Ms. Aufderheide, Chief Civil Prosecutor, told him that she "was going to direct the county not to release the town of residence of county employees." *Id.* at 142. The County disputed Mr. Brody's summary of his conversation with Ms. Aufderheide in its Response to Intervener's Motion for Summary Judgment. *Id.* at 158. Because the Court's decision was made on summary judgment, all facts should be construed in favor of the party that summary judgment is entered against. CR 56(c).

The Sun continues to perpetuate its version of Mr. Brody's and Ms. Aufderheide's conversation in its Brief to this Court by stating that "Aufderheide informed Brody that, in an effort to avoid potential liability claims from employee groups who might oppose the release, Aufderheide would direct the County not to release the town of residence of county employees." Brief of Respondent, pg. 6. Once again, the County disputes this version of the conversation as Ms. Aufderheide cannot and would not

direct the county not to release a record. And also as stated before, the written correspondence between the parties is an accurate reflection of the county's position and actions regarding the request. CP 158.

2. Deputy Civil Prosecutors are not members of the Deputy Prosecutor's Guild.

The Deputy Prosecutor's Guild is one of four guilds that sought the injunction against the County to stop the release of their town of residence to the Sun. The Sun claims in its Brief that all Kitsap County Prosecutors belong to the Prosecuting Attorney's Guild and that "the attorneys representing the County were in effect litigating with their own organization." Brief of Respondent, pgs. 7-8.

However, Civil Deputy Prosecuting Attorneys do not belong to any guild as they are charged with defending the County against the various employee guilds and unions. The Criminal Prosecuting Attorneys are members of the Prosecuting Attorney's Guild, but the Civil Prosecuting Attorneys are not members.⁵

//
/

⁵ See CP 6. *"The employment duties of the Petitioner's members include the investigation and prosecution of all felonies committed within Kitsap County including violent offenses."*

III. ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THAT THE COUNTY ARGUED AGAINST DISCLOSURE IN COURT.

A court abuses its discretion when its decision rests on facts unsupported by the record. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009).

The trial court's decision should be reversed because it erred in finding that the County argued against disclosure in court. CP 339. The transcript of proceedings speaks for itself, the County did not argue against disclosure in court, but only argued that the County should not be assessed fees and penalties. RP 29-41. Therefore, the trial court decision should be reversed because it is based on a factual error.

However, the Sun continues to claim that the County "advocated against disclosure during proceedings." Brief of Respondent, pg. 11. In addition, the Sun attempts to distinguish *Bellevue John Does*, 129 Wn.App. 832, from the present case because the school district did not oppose the newspaper in court. Brief of Respondent pgs. 19-20. The trial court inferred the same error in its discussion of *Bellevue John Does* by stating that it is "noteworthy that in this case the School District did not oppose the newspaper's disclosure request in court." CP 338.

The trial court and the Sun mis-state the record in this case. The

County did not argue against disclosure in court and the decision to award attorney's fees should be reversed.

B. CITING TWO EXEMPTIONS UNDER DELIBERATION TO A REQUESTER IS CONSISTENT WITH THE LETTER AND THE SPIRIT OF THE PRA.

In response to the Sun's email that the County had not complied with the PRA, the County complied by again explaining its actions in delaying the release of the record. This action was consistent with the letter and the spirit of the PRA. The County never withheld the records based on any exemption, and therefore it never wrongfully withheld any records.

The PRA expressly provides that an agency may delay its production "to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt." RCW 42.56.520. As the correspondence with the Sun demonstrates, these exact reasons are why the County delayed its production.

The fact that the County cited to an exemption and noted the records were probably exempt was consistent with the letter and the spirit of the PRA.

The Model Rules state that "an agency should have a reasonable belief that the record is arguably exempt" before it notifies a third party. WAC 44-14-04003(11). Moreover, "an agency has the discretion to provide exempt records." WAC 44-14-06002(1). Therefore, the fact that the County thought

the records were exempt and cited to an exemption is fully consistent with the AG Model Rules. It did not mean that the County had denied the request – the County unambiguously stated the opposite, that it had not determined whether it would withhold the records. Nor does it violate the spirit – if the County didn’t think an exemption applied, it should not have provided notice or delayed disclosure. Finally, the County’s actions were consistent with the spirit of the PRA because the County was being transparent in providing the Sun more information about possible exemptions – after the Sun made a statement that the County had not fulfilled its obligations under the PRA.

The Sun would have this Court re-write the PRA so that whenever a public agency told a requestor which exemptions were at issue while it was deliberating, the public agency would be in violation of the PRA. This is contrary to the PRA's purpose of promoting more openness and communication between citizens and the public agency.⁶ Not only does the Sun promote less sunshine between the requestor and the public agency, but it does so while ignoring the PRA itself.

The Sun devotes one footnote to RCW 42.56.520 in its brief regarding notification of third parties. Brief of Respondent, pg. 36, FN 9. However, the

⁶ AG Model Rules emphasize that “communication is usually the key to a smooth public records process both requestors and agencies.” WAC 44-14-04003(3).

Sun cannot dispute that the plain language of the PRA allows an agency a reasonable time to determine if an exemption applies and that the County took a reasonable amount of time to determine whether the exemptions applied. Instead, the Sun claims that the County's mere citation of two exemptions during its deliberation, is a violation of the PRA. According to the Sun, the County can deliberate on an exemption properly only if it does not reveal which exemption is at issue, even after the requestor accuses the County of not fulfilling its duties under the PRA. This is an absurd interpretation of the PRA.

The Model Rules advise that if the agency had a reasonable belief that the record was exempt when it notified affected third parties, then the additional time taken is not unreasonable. WAC 44-14-04003(11). Now, the Sun argues that the County's reasonable belief that the record might be exempt is effectively a denial of the record to the requestor instead of the pre-requisite to notification of third parties and its deliberation on the exemptions. The Sun cannot have it both ways, either the County's reasonable belief is consistent with the PRA or it is not.

The Sun does not dispute that the County's belief that two exemptions may apply is reasonable. In fact, the amount of briefing between the Sun and the Guilds regarding the exemptions demonstrates that it is not a well-settled

issue and a case of first impression. *See* CP 302. The County's reasonable belief that two exemptions may apply was what led it to notify its employees of the request, and to not object to the Guilds' injunction based on the two exemptions. And presumably, the exemptions were reasonable enough for the trial court to grant the preliminary injunction. Therefore, it is disingenuous for the Sun to now argue that the County's reasonable belief that two exemptions may apply is a denial of the record instead of the basis for an additional two weeks to deliberate on the exemption and notify third parties.

Finally, the Sun also ignores the most recent case in Division II regarding notification of third parties under the PRA. In *Ameriquest Mortgage Company v State Attorney General*, 148 Wn.App. 145, 157, 199 P.3d 468 (2009), the agency was soundly rebuked by this Court for not notifying the affected third parties. In fact, this Court remanded the case so that the third parties' interest would be represented in the trial court. Although the Sun argues that notification to third parties is an improper "solicitation" for a lawsuit, the *Ameriquest* court considered the third parties presence necessary for a proper adjudication of the issues.

The Sun attempts to manufacture violations of the PRA which are contrary to the letter and the spirit of the PRA. The PRA allows for attorney's fees for improper withholding, not improper citing of exemptions. The County

did not improperly withhold the record while it deliberated on two exemptions because it never denied the request, it only requested an additional two weeks pursuant to RCW 42.56.520. Furthermore, it had a reasonable basis to consider the two exemptions (and communicate them to the parties) even though the trial court eventually ruled, after much briefing and argument, that the exemptions did not apply.⁷

C. A PARTY WHO INTERVENES AFTER THE COUNTY HAS BEEN ORDERED TO NOT RELEASE A RECORD, CANNOT THEN COLLECT ATTORNEY'S FEES FOR PREVAILING.

According to the Sun's argument, a party can request a record that is arguably exempt, wait for the affected third party to file an injunction against the agency, then intervene, claim to be a prevailing party against the agency because the agency "improperly withheld" the record, and collect fees and penalties. The County agrees with the Sun that this process benefits private lawyers who take PRA cases on contingency. Brief of Respondent, pgs. 48-49. However, the County disagrees that this process is necessary to promote the purpose and policies of the PRA which are to promote full access to information while "mindful of the right of individuals to privacy and of the desirability of the efficient administration of government." RCW

⁷ The trial court granted the preliminary injunction based on two exemptions, then later ruled in a summary judgment motion that the record was disclosable.

42.17.010(11); *Bellevue John Does 11 v. Bellevue School Dist.*, 164 Wn.2d 199, 209, 189 P.3d 189 (2008) (quoting this provision).

The Sun would have this Court construe all the County's actions as a way to "shield themselves under the cloak of a proxy"⁸ instead of what they were: the proper way pursuant to RCW 42.56.520 to respond to a request that affects the privacy of more than 1,000 employees. To this end, the Sun paints the County as one who secretly conspired with the Guilds against the Sun to "solicit" a lawsuit that it would "capitulate" to in order to avoid fees.⁹ Not only is there no evidence for such a portrayal of the County's actions, but even if the County had conspired against the Sun, as the Bellevue School District conspired against the Times in *Bellevue John Does*, that is not a basis to award fees to the Sun. In fact one of the partners at the law firm representing the Sun was sanctioned for making this same argument in the *Bellevue John Does* case. *Bellevue John Does I*, 129 Wn. App. at 869.

In this case, however, the County's actions were completely transparent. The Sun was copied on all the communication between the County and the employees, and was given notice of the Guilds' injunction on

⁸ Brief of Respondent, pg. 48.

⁹ The Sun described the County's actions as "soliciting" and "capitulating" numerous times in its Brief. Brief of Respondent, pgs. 2-4, 25-26, 28, 36, 40, 47-48.

the same day it was filed. CP 43. It is disingenuous for the Sun to imply such a scenario which is not even relevant to the issue in this case.

- 1) This case is not distinguishable from *Bellevue John Does* but is distinguishable from *Doe I*.

The parties agree that a limited number of cases address third party injunctions under the PRA and that the rule is that the requester is not awarded fees when the agency was prevented from disclosing the record. Brief of Respondent, pgs. 12-20. The Sun unsuccessfully attempts to distinguish this case from *Bellevue John Does* and rely on *Doe I* instead.

a) *Bellevue John Does*

The Sun claims to be a prevailing party deserving of attorney's fees because the County and the Guilds' interests were allegedly aligned against the Sun, the intervener. This exact argument by the partner of the attorney representing the Sun made that was soundly rejected in the most recent third party injunction case: *Bellevue John Does*. See Appellant's Brief, pgs. 17-20.

The Sun avoids the critical fact in *Bellevue John Does* that attorney's fees were not awarded even though the Districts strategized with the teachers on how disclosure could be resisted. Furthermore, the court held that fees should not be awarded because "legal proceedings were instigated by the teachers, not the districts, and during the proceedings the school districts were not adverse parties to the Times." 129 Wn.App. at 866. Similarly, the Guilds

instigated the legal proceedings and the County was not adverse to the Sun during the proceedings.¹⁰

The Times argued unsuccessfully in *Bellevue John Does* that *Confederated Tribes* was not applicable to its case because the Times fell “within the statutory category of a ‘person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record.’” *Bellevue John Does*, 129 Wn.App. at 866. But the *Bellevue John Does* court was not persuaded because in both cases “the statute does not authorize an award of attorney fees against an agency ‘where the action was brought to prevent, rather than compel, disclosure.’” *Id. quoting Confederated Tribes*, Wn.2d at 757. The Sun is making the same “prevailing party” argument as its counsel did in *Bellevue John Does*. The argument should be rejected on the same basis as before: the action was brought by the Guilds to prevent, rather than compel, disclosure.

Finally, the Sun argues that the County did not “agree to release the record” because it cited an exemption and did not object to an injunction. Brief of Respondent, pg. 18. Although the *Bellevue John Does*’ record does not indicate whether the Districts cited exemptions or what their response was

¹⁰ Contrary to the Sun’s argument, no court has stated that the agency must actively align itself with the requestor as the Sun claims, only that it not be adverse to the requestor.

to the guild's injunction, there is evidence that the Districts actively opposed the release of the record and strategized with the guilds on how to effectively bring a temporary restraining order. 129 Wn.App at 865. Still, the court did not award attorney's fees to the Times.

The Sun has tried to avoid this conclusion by filing its lawsuit against the County. But this was filed after the injunction was already in place. The Sun had notice of the TRO hearing, yet chose to wait to intervene. A requester cannot avoid the dictates of *Confederated Tribes* and *Bellevue John Does* simply by filing their own lawsuit when an injunction is already in place. Otherwise, this would make the holdings in those cases meaningless and provide a way to any savvy requester to milk tax dollars out of public agencies that are complying with court orders.

The Sun cannot distinguish *Bellevue John Does* from the present case. All of the same arguments were made in that case, and all were rejected.

b) *Doe I*

The Sun's reliance on *Doe I v. Washington State Patrol*, 80 Wn.App. 296, 908 P.2d 914 (1996), is also misplaced. In *Doe I*, the agency was required to pay some fees and penalties¹¹ to a third party intervener because it

¹¹ The fees and penalties awarded were only for those timeframes where the agency acted improperly, they were not assessed for the period during the injunction as that was not improper withholding. *Doe I*, 80 Wn.App. at 304-05.

failed to respond promptly to the requester. *Id.* at 304. The *Bellevue John Does* court also considered whether *Doe I* was relevant in its case, and determined that it was not because “the pivotal fact in that case – the State Patrol’s delay and failure to comply with statutory deadlines-is not present here.” *Bellevue John Does*, 129 Wn.App. at 867. Likewise, in this case, the County complied with all statutory deadlines, and should not be assessed fees.

Doe I was decided before *Confederated Tribes*, which was the first Washington Supreme Court case to clearly state that attorney fees are not available under the PRA when an agency is prevented from disclosing a record. *Doe I* was not relevant to the *Bellevue John Does* court and should not be relevant to this court.

2) The Sun’s status as a prevailing party does not make an award of fees mandatory under *Spokane Research*.

The Sun’s argument that it is entitled to fees because it is a prevailing party under *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005), is irrelevant because the City of Spokane was not prevented from disclosing the records by an injunction. 155 Wn.2d at 93-95. The intervener, who also had his own PRA action against the city, *joined* with another requester of the same records, then requested attorney’s fees as a prevailing party. *Id.*

The issue before the court was whether a prevailing party had to be the cause of the disclosure of the record with the concern that agencies would voluntarily hand over records once they were sued to avoid paying attorney's fees. *Id.* at 103-04. Ultimately, the court held that causing disclosure of public records is not necessary to obtain status as a prevailing party entitled to fees. *Id.*

The present case is factually and legally distinguishable from *Spokane Research*. The City was not prevented from disclosing the record, unlike the present case, and the intervener joined with another requester of the same records, unlike the present case where the intervener opposed an injunction, not the County.¹² And the court's concern that an agency would avoid fees by voluntarily handing over the requested record once a lawsuit was filed is not at issue here where the County was already prevented by court order from disclosing the record.

The County does not dispute the Sun's status as a prevailing party any more than the Times was in *Bellevue John Does*; however, the Sun is not entitled to fees when the County was prevented from disclosing the record.

¹² Conversely, the Sun argues that it is entitled to fees because its intervention was the cause of the disclosure. Brief of Respondent, pg. 28.

D. THE COURT CANNOT MANDATE THE COUNTY'S POSITION ON A LAWSUIT WITHOUT BEING IN VIOLATION OF CR 11.

The Sun argues that the County's lack of objection – or “capitulation” - to the Guilds' injunction made the County an adverse party to the Sun. Conversely then, the County's “capitulation” to the Sun's intervention, made it an adverse party to the Guilds. Neither view is supportable. The County did not argue for or against disclosure of the record at any time during the proceedings because that was the most reasonable position it could have taken in the circumstances.

However, the Sun contends that the County cannot remain neutral and that it must advocate for disclosure regardless of whether there is a reasonable basis to do so. Not only does the Sun lack foundation for this argument, but it also advocates that when public agencies are defendants, they must take a certain position in order to avoid attorney's fees, a clear violation of CR 11.

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 exempt from disclosure and to notify County employees of the request. Because the County was prevented from disclosing the record by court order,

and 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 October 14, 2009.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



DEBORAH A. BOE WSBA #39365
Deputy Prosecuting Attorney
Attorney for Appellant Kitsap County

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 October 14, 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

FILED
COURT OF APPEALS
DIVISION II
09 OCT 15 PM 2:26
STATE OF WASHINGTON
BY [Signature]
DEPUTY

- Via U.S. Mail
- Via Fax:
- Via Email: greg@alliedlawgroup.com;
michele@alliedlawgroup.com ;
david@alliedlawgroup.com
- 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 October 14, 2009, at Port Orchard, Washington.

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