

COURT OF APPEALS
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

THE KITSAP SUN, also known as BVR Corp., doing business as The
Kitsap Sun,

Respondent,

vs.

KITSAP COUNTY,

Appellant.

BRIEF OF RESPONDENT THE KITSAP SUN

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I. INTRODUCTION

This case concerns the proper interpretation of RCW 42.56.550(4) of the Public Records Act (“PRA”), which awards mandatory attorneys’ fees, costs, and penalties to a person who prevails in any action brought against a public agency seeking the right to inspect or copy any public record. The question of whether the records were exempt from disclosure has not been appealed; rather, the question is whether the records requestor prevailed against the agency and therefore is entitled to attorneys’ fees, costs, and penalties.

As discussed below, the agency here, Kitsap County (“County”) cited two specific statutory exemptions in response to a public records request from Respondent Kitsap Sun (“Kitsap Sun”). The County then sent a communication to its employees indicating that the Kitsap Sun made a request for records and that the County would consider seeking an injunction against the request if the employees objected to the release of these records. Several employee guilds (“Guilds”) then brought suit seeking an injunction. The Kitsap Sun intervened in the injunctive action and filed its own PRA enforcement action against the County to obtain the records from the County.

During the course of the proceedings, the County gave multiple indications that its interests were aligned with its employees’ Guilds and

that it did not oppose injunctions to withhold the records. Specifically, the County capitulated to a temporary—and then permanent—injunction brought by the Guilds blocking release of the requested public records.

After a hearing upon the parties' cross motions for summary judgment, the Honorable Craddock Verser, ruled that the records were disclosable and awarded mandatory attorneys' fees, costs, and penalties to the Kitsap Sun against the County—the County then released the records.

The County now argues that the trial court erred in awarding those fees and penalties because the Kitsap Sun in actuality prevailed against the Guilds, not the County, because the County did not withhold the records. The County asserts it was a neutral bystander merely holding the records and waiting for a court to rule on whether they were exempt. However, the record clearly shows the County did indeed withhold disclosure of the records, opposed disclosure by claiming the records were exempt from disclosure, and capitulated to a permanent injunction precluding disclosure. This is not neutrality. The Public Records Act requires more than neutrality from an agency—the Act imposes a “positive duty” on an agency to provide public records that are not exempt from disclosure—a fact admitted by the County. Claiming exemptions and capitulating to injunctions against disclosure is not the discharge of the County's positive duty to provide them, and hence the County was withholding them—

which the trial court ruled was wrong since the records should have been disclosed upon request.

Thus, the Kitsap Sun prevailed against the County because the County was withholding the records. The County's main argument—that it also “prevailed” because the injunction against it in the case brought by the Guilds was dissolved is incorrect because it only looks at one of the two cases, and ignores the second case, the PRA enforcement case which the County undeniably lost to the Kitsap Sun. The Kitsap Sun prevailed over the County in the PRA enforcement action; the County did not prevail in the trial court orders at issue on appeal.

This case will determine if public agencies can tell a requestor that the records they seek are exempt from disclosure, invite third parties to file an injunction preventing disclosure, capitulate to injunctions against disclosure, and all the while claim the agency is “neutral”—thus laying the foundation for a later argument that the agency is relieved from the prospect of paying a prevailing requestor's attorneys' fees, costs, and penalties. That is, agencies can sidestep the PRA's positive duty to disclose non-exempt records, and escape the PRA's consequences of doing so. However, as described below, the PRA is structured to create every incentive for agencies to disclose and every disincentive to withhold, and the County's arguments run exactly counter to this structure.

This case is far less complicated than the County makes it out to be. As briefed in detail below, a requestor prevails against a public agency when he or she makes a public records request, does not obtain the records from the agency, files a PRA enforcement action, and then obtains public records that should have been provided. *See Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005). The fact that this case occurred in the context of the third-party injunction statute under the PRA does not change the fact that the County failed to provide non-exempt records that it withheld because it believed they were exempt and capitulated to a permanent injunction blocking release of the records during the proceedings. Because the Kitsap Sun made a public records request to the County, did not obtain them from the County, filed a PRA enforcement action, and obtained records that (indisputably) should have been provided upon request, the Kitsap Sun prevailed against the County. Thus, the Kitsap Sun is entitled recover attorneys' fees, costs, and penalties from the County. RCW 42.56.550(4).

The trial court's ruling as such should therefore be affirmed.¹

¹ Also, the County has not appealed the trial court's ruling that the records were legally required to be provided—thus, it is a verity on appeal that the records should have been provided upon request. *See Washington State Dept. of Natural Resources v. Browning*, 148 Wn. App. 8, 16-17, 199 P.3d 430 (2008) (appellate court considering findings of fact and conclusions of law not challenged by appellant to be verities on appeal) (citation omitted).

II. ASSIGNMENTS OF ERROR

Respondent Kitsap Sun assigns no error to the trial court's award of attorneys' fees, costs, and penalties to Respondent.

III. STATEMENT OF THE CASE

A. PRA Request for Employee "Town of Residence"

On July 21, 2008, Jeff Brody, the Managing Editor and Director of Content Development at The Kitsap Sun emailed a series of requests to local cities and counties, pursuant to the Public Records Act ("PRA"), RCW 42.56. *et. seq.* CP 54. The requests consisted of information regarding those agencies' employees, including their towns of residence. CP 54-55. The purpose of the request, in large part, was for The Kitsap Sun to verify identification of people in news stories, for the purposes of a report on whether local employees can afford to live where they work, to ensure that residency requirements for some elected officials were met, and to help identify and prevent the possibility of "ghost employees" CP 140-41; CP 352-55. Of the eight cities and counties to which Brody made the request, only Kitsap County failed to provide the towns of residence for its employees. CP 54-55.²

² One city, Port Townsend, initially failed to provide the records but later did so.

B. Kitsap County Withholds the Requested Records

On August 8, 2008, Brody received a phone call from Kitsap County Civil Deputy Prosecuting Attorney Jacquelyn Aufderheide. CP 142. 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. *Id.* She also mentioned that she “wasn’t sure whether the town of residence is disclosable.” *Id.* Aufderheide further stated to Brody that the County’s plan was to contact all county employees to let them know about the request, and if anyone objected, “to seek a declaratory court decision about the point of law.” *Id.*

Later that same day, August 8, 2008, Brody received an email from Don Burger, the Records Coordinator from the County’s Department of Administrative Services; attached to that email was a spreadsheet of the requested records—but without the employees’ towns of residence. CP 142-43. Burger also wrote that the County believed that it was “not clear” whether the towns of residence were exempt and provided a copy of an email sent by the County to its employees inviting them to object to the release of the information. CP 143, CP 154-55. Specifically, the email to the employees listed the aspects of The Kitsap Sun’s request that the County believed to be disclosable, but added:

However, 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.”

CP 154.

On August 15, 2008, Kitsap County Purchasing & Records

Manager R’Lene Orr wrote a letter to Brody. CP 65. The letter from the County stated:

On August 8, 2008, we responded to your request for records by submitting the records you requested, except that the response did not include the employees’ town of residence. 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 42.56.050**, 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.

Id. (emphasis added).

C. Injunction From the Guilds, Unopposed by the County, and Intervention by The Kitsap Sun

On August 22, 2008, The Kitsap County Prosecuting Attorney’s Guild (to which all Kitsap County deputy prosecutors belong—*see* CP 17) and Kitsap County Deputy Sheriff’s Guild filed a Petition for Declaratory Judgment and Preliminary Injunctive Relief seeking to enjoin the disclosure of the towns of residences of the County employees within their respective organizations. CP 4-8. Since Kitsap County deputy

prosecutors are members of one of the Guilds, the attorneys representing the County were in effect litigating with their own organization over the release of their own town of residence records. Two additional Guilds later joined in the intervention as petitioners in the injunctive case. CP 66-68. The Guilds later filed a summary judgment motion on September 15, 2008, asking the court to issue a declaratory judgment that the town of residence of County employees is exempt from disclosure under RCW 42.56.250(3) and RCW 42.56.050. CP 15-41.

Before the County responded, The Kitsap Sun filed its Motion to Intervene on September 19, 2008. CP 42-53. The Motion to Intervene also had attached a proposed Complaint against the County seeking disclosure of the records under the PRA. CP 48-53. The parties stipulated to the intervention of the Kitsap Sun and the filing of the Kitsap Sun's PRA enforcement action. CP 66-68. The Kitsap Sun filed its Complaint to Enforce Public Records Act against the County on October 14, 2008. CP 69-75.³

³ The PRA case sought relief only against the County; the Guilds were named as defendants only because the question of the release of the records affected their interests. *See* CP 71 at ¶ 15.

D. Kitsap Sun Files Its Motion for Summary Judgment and the County Does Not Dispute Guilds' Motion for Summary Judgment

On October 21, 2008, The Kitsap Sun filed its Motion for Summary Judgment, arguing that the County employees' towns of residence do not fall under the PRA's exemption for records that would constitute an invasion of privacy if disclosed; that the information does not constitute "personal information" under the exemption in RCW 42.56.230(2); and that a town of residence is not a residential address as contemplated by the exemption under RCW 42.56.250(3). CP 76-104. The Kitsap Sun's Motion for Summary Judgment also argued that the County violated the PRA by withholding the requested records and by merely claiming to be a "stakeholder" in the matter until the trial court orders disclosure. CP 102-04.

On October 28, 2008, the County filed its Response to Kitsap Sun, arguing that it had complied with its procedural duties under the PRA by requesting additional time to respond to its request so it could notify the County employees of the request, and that the County should not be liable for attorneys' fees and penalties if Kitsap Sun is ultimately successful at trial. CP 156-66.

Also on October 28, 2008, Kitsap County filed its Response to the Guilds, stating only that "Kitsap County has no objection to [Guilds']

Motion for Summary Judgment and Injunctive Relief.” CP 167-69. This bears repeating: the County had “no objection” to a permanent injunction against disclosure of public records. *Id.*

E. Trial Court Decisions Regarding Exemption and Attorneys’ Fees

On November 25, 2008, Judge Verser issued a Memorandum Opinion and Order on Motions for Summary Judgment denying the Guilds’ Motion for Summary Judgment and dismissing their Petition—and also granting The Kitsap Sun’s Motion for Summary Judgment in the PRA enforcement case. CP 279-287. The trial court concluded that the County’s employees’ towns of residences are public records subject to the PRA; that an employee’s town of residence is not exempt from disclosure under RCW 42.56.250(3) because there is no indication the Legislature intended for such information to be exempt; and that the employees’ rights to privacy would not be invaded by the disclosure of their towns of residence. *Id.* The November 25, 2008 Order also ruled that The Kitsap Sun was the prevailing party, and therefore that it was entitled “to its costs and reasonable attorney’s fees incurred in prevailing against the County.” CP 287.

After consideration of the briefs exchanged between The Kitsap Sun and the County on the attorneys’ fee, costs, and penalty issue, the trial

court issued its Memorandum Opinion and Order on Attorney Fees and Sanctions on February 18, 2009. CP 336-42. The trial court first ruled that The Kitsap Sun was the prevailing party. Citing *Yakima Newspapers v. Yakima*, 77 Wn. App. 319, 890 P.2d 544 (1995), *Confederated Tribes v. Johnson*, 135 Wn. 2d 734, 958 P.2d 260 (1998), and *Bellevue John Does 1-11 v. Bellevue School District*, 129 Wn. App. 832, 120 P.3d 616 (2005), *rev'd on other grounds* 164 Wn.2d 199 (2008), the trial court concluded that those cases where the agency was not liable to pay for fees, costs and penalties to a prevailing requestor when a third party brings a suit to enjoin disclosure did not apply to the County because the agencies in those cases did not “oppose the requested disclosure” as the County had. CP 339.

Specifically, the trial court noted that in none of the above-cited cases did the agencies cite an exemption in its initial response to the requestor (as Kitsap County did here), nor had the agencies in those cases advocated against disclosure during proceedings (as Kitsap County did here). The trial court continued, citing the fact that the County acknowledged “that it would not have opposed the injunction sought by the guilds which would have prevented the disclosure that the court found mandated by the PRA. Without any opposition to the requested

injunction, it is not likely that the result [preliminary injunction against disclosure] would have been the same.” *Id.*

F. County Appeals Trial Court’s Award of Attorneys’ Fees, Costs, and Penalties to Kitsap Sun

On July 20, 2009, Kitsap County filed its Brief of Appellant, seeking appellate review of the trial court’s conclusions that The Kitsap Sun prevailed against Kitsap County; that Kitsap County had cited an exemption in its initial response to The Kitsap Sun’s request for records; and that Kitsap County had argued against disclosure of the record in court. Brief of Appellant (“Br. of Appl.”) at 14-34.

IV. LEGAL AUTHORITY AND ARGUMENT

A. Case Law Addressing Issue of Requestor Prevailing Against an Agency

As both parties seem to acknowledge, the issue before this Court is controlled by a limited universe of cases. The relevant facts and rules from each are discussed below.

1. Cases Discussing Third-Person Injunction Actions

a) *Yakima Newspapers, Inc.*

In *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 890 P.2d 544 (1995), a newspaper made a public records request for documents related to the performance of a former fire chief. The request was denied, and the newspaper brought a PRA action to compel

disclosure. 77 Wn. App. at 321. The former fire chief intervened in the newspaper's action and, following a hearing, the trial court ordered disclosure of the record to the newspaper. *Id.* at 322. The city and newspaper agreed to a stipulated order of dismissal, but the former fire chief appealed, arguing that the record at issue was exempt under a privacy-based exemption. *Id.*

The Court of Appeals, at Division III, ruled that the privacy exemption did not apply to the record sought. The newspaper had cross-appealed and sought its attorney fees on appeal from the former fire chief. *Id.* at 329. The newspaper argued that the former fire chief “took the place of the ‘agency’” when he pursued his appeal. *Id.* The court ruled that the mandatory attorney fees and penalties provision in the PRA (now RCW 42.56.550(4)) do not apply to situations “in which an individual and *not the City* opposed [the newspaper] on appeal” and denied fees for the newspaper on appeal. *Id.* at 329 (emphasis added). So, as a corollary, when an agency opposes a requestor, a successful requestor should obtain attorneys’ fees, costs, and penalties.

b) *Doe I*

In *Doe I v. Washington State Patrol*, 80 Wn. App. 296, 908 P.2d 914 (1996), *overruled on other grounds by Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004), a woman (Jane Doe) alleged

that a man (John Doe) sexually assaulted her while on state business in Puerto Rico. The State Patrol investigated the incident, and compiled a report. It later gave that report to the local prosecutor and also disclosed parts of the report to John Doe. *Doe I*, 80 Wn. App. at 298. Jane Doe requested the report, and John Doe's attorney informed the State Patrol that he would oppose disclosure. *Id.* at 299. The State Patrol told Jane Doe she could not have the report until the authorities in Puerto Rico had concluded the matter. *Id.* The State Patrol notified John Doe that the agency would release the report to Jane Doe unless John Doe filed an action to block the release of the record by a certain date. *Id.*

John Doe filed an action for declaratory and injunctive relief against the State Patrol. Following a series of continuances initiated by both parties, the trial court ordered the records released to Jane Doe. *Id.* Jane Doe moved for attorney's fees, costs, and penalties, but the trial court deducted the amount of time taken Jane Doe's request and the court order for disclosure, and for the time after the order and when a party finally prepared a final order for the court to sign. *Id.* at 300.

The Court of Appeals, at Division III, rejected the State Patrol's argument that because its position throughout the litigation was that "the report should be disclosed to Jane Doe," the agency should be considered a prevailing party against John Doe's action and therefore not have fees

and penalties assessed against it. *Id.* at 302. The appellate court concluded that the trial court “clearly believed the state patrol was not the prevailing party in this context.” *Id.* at 303. On this point, the State Patrol argued that it was “merely ‘a stakeholder awaiting the outcome.’” *Id.* The court concluded that because “[t]he parties were not representing the same interests...*both cannot be prevailing parties.*” *Id.* (emphasis added).

The State Patrol argued also that it was justified in withholding the records “to determine whether the record was exempt, to give notice to John Doe of the request, and to give John Doe a reasonable opportunity to oppose the disclosure.” *Id.* The Court of Appeals rejected this argument, finding that the State Patrol did not respond to Jane Does’ request within the statutory timeframe, and it preferred the right of John Doe during the period prior to the injunction. *Id.* at 303-04. Because the court found that the State patrol did not give the requestor Jane Doe the statutorily required “fullest assistance” (RCW 42.56.100) and failed to promptly reply to Jane Doe’s request, the agency violated the PRA and the trial court abused its discretion in not awarding penalties for the period sought by Jane Doe. *Id.* at 304.

c) *Confederated Tribes*

In *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998), a requestor made a request for records held by the state Gambling

Commission indicating certain payments made by Indian tribes. 135 Wn.2d at 742. The Gambling Commission had no objection to the release of the records, and took the position that they were *not exempt* from disclosure. *Id.* However, the Gambling Commission notified each tribe involved in the request, “in order to give the tribes an opportunity to request an injunction to prevent it from releasing the records.” Four tribes filed an action seeking injunctive relief and the requestor filed a cross complaint for a PRA enforcement action. *Id.* at 743. After oral argument and consideration of the briefs, the trial court ordered that the records be disclosed. *Id.* The tribes appealed and the State Supreme Court accepted review. *Id.*

During the proceedings, the Tribes argued that their gaming compacts were exempt from disclosure. *Id.* at 750. The Gambling Commission argued against withholding, asserting instead that the records were not exempt from disclosure. The Court agreed with the Gambling Commission and ordered disclosure. *Id.* at 751-53.

The requestor in *Confederated Tribes* sought attorney’s fees, costs, and penalties under the PRA (RCW 42.56.550(4)).⁴ *Id.* at 757. Citing *Yakima Newspapers*, the Court stated that “[t]he Court of Appeals has interpreted [RCW 42.56.550(4)] to be inapplicable to cases in which an

⁴ The requestor also sought attorneys’ fees under equitable doctrines related to wrongful injunctions. Those doctrines are not at issue in the case before this Court.

individual—rather than the agency—opposes disclosure of the records, and where the action was brought to prevent, rather than compel, disclosure.” *Id.* The Court continued, stating that “[RCW 42.56.550(4)] does not authorize an award of attorney fees in an action brought by a private party, pursuant to [the PRA’s injunction statute, RCW 42.56.540], to prevent disclosure of public records held by an agency where the agency has *agreed* to release the records but is prevented from doing so by court order.” *Id.* at 757 (emphasis added). In that context, where the agency agreed to disclosure, the Court concluded that the requestor “prevailed against the Tribes, not against the agency.” *Id.* The Court continued by determining that the requestor was also not entitled to attorney fees based on any reasonable delay by the agency (that agreed to disclose) because the agency’s delay in providing the requested records was justified by the statute allowing an agency to delay disclosure while giving notice to third parties that may be affected by disclosure. *Id.* at 758. So when an agency *agrees* that records should be disclosed in a third-party injunction action, then the agency is not liable for attorneys’ fees, costs, and penalties under the PRA.

d) *Bellevue John Does*

In *Bellevue John Does 1-11 v. Bellevue School District*, 129 Wn. App. 832, 120 P.3d 616 (2005), *rev’d on other grounds* 164 Wn.2d 199

(2008), a newspaper asked three school districts for records identifying teachers accused of, investigated, or disciplined for sexual misconduct within the previous 10 years. 129 Wn. App. at 839. In responding to the request, the districts did *not* claim any of the records were exempt from disclosure (unlike Kitsap County did here). The school districts notified 55 current and former teachers whose records the districts had gathered in preparation of responding to the newspaper. *Id.* Thirty-seven of the teachers filed an injunction against the districts to block the release of their records, arguing that the release of the records would be a violation of their privacy. *Id.* The newspaper was granted the right to intervene. *Id.* The districts did not oppose disclosure and did not stipulate to a preliminary injunction (unlike Kitsap County did here).

The trial court ultimately withheld the names of seven John Does on the basis that the charges of sexual misconduct were “unsubstantiated” and therefore of no public interest, but released the names of 22 plaintiff teachers where misconduct was substantiated. *Id.* at 849. The Court of Appeals ruled that names of teachers the subject of unsubstantiated allegations of sexual misconduct—but not patently false—are subject to public disclosure. *Id.* at 857.

The newspaper moved for attorney fees and costs against the agencies on the basis that the agencies had formally taken the position that

the records should be disclosed but had actively opposed the release of the records. *Id.* The trial court denied the newspaper's request for fees, ruling that the agencies—the school districts—did *not oppose* the newspaper's request but the individual teachers involved. *Id.* at 864-65. One of the districts moved for sanctions against the newspaper for filing its motion for attorney fees, which was denied by the trial court. *Id.* The newspaper then moved to vacate the order denying fees, arguing that there was new evidence (culled from a district's response to a PRA request) that the districts communicated with the teachers indicating sympathy with their position and that they were trying to avoid disclosure of the records. *Id.* The trial court concluded that sanctions were warranted because there was no evidence that any alleged hostility from the agencies actually resulted in a delay in the newspaper gaining access to the records, and that the legal proceedings were instigated by the teachers, and “during the proceedings the school districts were *not adverse parties* to the [newspaper].” *Id.* at 866 (emphasis added).

As to attorneys' fees, the issue most relevant here, the *Bellevue John Does* court cited *Confederated Tribes* for the rule that “attorneys' fees are not available under [RCW 42.56.550(4)] ‘where the agency has *agreed* to release the records but is prevented from doing so by court order.’” *Id.* at 864 (emphasis added). The appellate court continued by

noting that in *Confederated Tribes*, the tribes resisted disclosure, but the agency did not. *Id.* (“[t]he requester of the records was denied an award of attorney fees because he ‘prevailed against the Tribes, not against the agency.’”) (citing *Confederated Tribes*, 135 Wn.2d at 756-57). The *Bellevue John Does* court concluded that the newspaper had not adequately distinguished *Confederated Tribes*, where attorneys fees and penalties were not granted to the requester, and which interpreted the attorney fees provision “to be inapplicable in legal actions when an individual rather than an agency opposes disclosure[.]” 129 Wn. App. at 864 (citing *Confederated Tribes*, 135 Wn.2d at 757). The *Bellevue John Does* court continued by noting that “[t]he record confirm that the school district did not oppose the [newspaper’s] disclosure request in court[.]” 129 at 866-67. The *John Does* court also rejected the newspaper’s attempted application of *Doe I*, holding that that case was “not on point” and that it does not help the newspaper because in *Doe I*, the agency’s delay and failure to comply with statutory deadlines was not present in the immediate case. *Id.* at 867.

2. *Spokane Research* establishes prevailing party standard

The other relevant doctrine is that of the “prevailing party” under the PRA. In *Spokane Research & Defense Fund v. City of Spokane*, 155

Wn.2d 89, 117 P.3d 1117 (2005), a reporter (not affiliated with the Spokane Research and Defense Fund) made public records request to the City of Spokane for correspondence between various city officials and those involved in a city project. 155 Wn.2d at 93-94. The reporter filed a PRA enforcement action because the city had not completed its review of “confidential” documents. *Id.* at 94-95. The Spokane Research and Defense Fund filed its own PRA enforcement action, seeking the same records, and the reporter intervened in that action. *Id.* at 95-96. After a summary judgment hearing, the trial court concluded that the reporter’s intervention was not the cause of the eventual release of the records; that the city had acted reasonably in withholding the record until the scope of the privilege waiver ascribed to the records was settled; and that some documents properly fell within the attorney-client and work product doctrine and were thus exempt. *Id.* at 96-97.

Relevant here, the reporter appealed the trial court’s conclusion that he was not a prevailing party because his intervention did not cause the release of the records and that he failed to obtain a show cause order. *Id.* at 97. The State Supreme Court rejected the trial and appellate courts’ conclusion that—in order to prevail—the requester’s action needed to be the cause of the disclosure. *Id.* at 102-03. This rule, according to the Court, would allow agencies to “resist disclosure of records until a suit is

filed and then to disclose them voluntarily to avoid paying fees and penalties,” a rule that “flouts the purpose of the [PRA].” *Id.* at 103. The Court continued by noting that nowhere in the PRA is prevailing party status conditioned upon causing disclosure of the records sought—rather, “the ‘prevailing’ relates to the legal question of whether the records *should have been disclosed.*” *Id.* at 103-04 (emphasis added). “Subsequent events do not affect the wrongfulness of initial action to withhold the records if the records were wrongfully withheld at that time.” *Id.* at 104. Further, the Court stated:

The harm occurs when the record is improperly withheld. The requester should recover his costs, and the agency should be penalized, if the requester has to resort to litigation (the reason for the later disclosure is irrelevant). This rule promotes [the PRA’s] broad mandate of openness.

Id. at 104 n.10. Ultimately, the Court ruled that if a court reviews the records provided to the reporter and determines that they should not have been withheld, he will be the prevailing party entitled to mandatory attorney fees, costs and penalties. *Id.* at 103.⁵ So if a request is made,

⁵ For context, it is important to note the effect of *Spokane Research* on ‘prevailing party’ law under the PRA. The previous tests, and there were several, included a requirement that the prevailing party have an affirmative judgment in their favor at the conclusion of the entire case (see *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 825 P.2d 324 (1992)), or that a party prevails only if it can be said that the cause of action could reasonably be regarded as necessary to obtain the information and that the lawsuit had a causative effect on the release of the sought records (see *Coalition on Government Spying v. King County Dept. of Public Safety*, 59 Wn. App. 856, 801 P.2d 1009 (1990) (“COGS”) *overruled on other grounds* by *Spokane Research*, 155 Wn.2d 89, or even that a party does not prevail on appeal even upon a showing that records were wrongfully

records are not provided, a PRA enforcement action is filed, the records are released (for whatever reason), and the records should be provided upon request, the requestor prevails against the agency.

B. Standard of Review

The standard of review for a reviewing court upon a trial court's order for summary judgment is *de novo*. See *Parmelee v. Clarke*, 148 Wn. App. 748, 753, 201 P.3d 1022 (2008). Generally, agency decisions made under the PRA are also reviewed *de novo*. See *Bellevue John Does 1-11 v. Bellevue School District*, 164 Wn.2d 199, 208-09, 189 P.3d 139 (2008) (citation omitted); see also *Lindeman v. Kelso School Dist. No. 458*, 162 Wn.2d 196, 200-01, 172 P.3d 329 (2007) (citation omitted). Issues related to statutory construction are also reviewed *de novo*. *Bellevue John Does*, 164 Wn.2d at 209 (citation omitted). Therefore, whether The Kitsap Sun was entitled to attorneys' fees, costs and penalties as a prevailing party is an issue of law, reviewed *de novo*. *Spokane Research*, 155 Wn.2d at 103.

C. Trial Court's Decision Should be Upheld on Appeal

1. Trial Court's Decision and Order

The trial court concluded in its November 25, 2008 Order on Summary Judgment that the Kitsap Sun is "entitled to its costs and

denied if the agency also substantially prevailed on appeal (see *Smith v. Okanogan*, 100 Wn. App. 7, 994 P.2d 857 (2000)). *Spokane Research* held that instead of these tests, which were more difficult for requestors to meet, the standard is the much more liberal test of whether the records should have been provided upon request.

reasonable attorney's fees incurred in prevailing against the County." CP 287. The trial court further concluded in its February 18, 2009 Order on Attorney Fees and Sanctions that The Kitsap Sun is the prevailing party. CP 337-39. The crux of the County's argument is not that The Kitsap Sun is not the prevailing party (an impossible argument), but that the trial court erred in ruling that The Kitsap Sun prevailed over the County—and not merely the Guilds. Brief of Appl. at 13-14, 32-34. This argument is without merit for the reasons set forth below.

2. Prevailing party general rules

Under the PRA, attorneys' fees, costs, and penalties are awarded to "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record" RCW 42.56.550(4); *see Lindeman*, 162 Wn.2d at 204 (to be awarded attorney's fees and costs, a requestor under the PRA must prevail against the agency). As stated above, the controlling rule is from *Spokane Research*, 155 Wn.2d at 103 ("[W]hether a party is 'prevailing' relates to the legal question of whether the records should have been disclosed on request.").

Under the PRA, a requestor is the prevailing party if the trial court concludes that the requested public record should have been disclosed upon request, *see id.*, or if the agency violated a procedural aspect of the PRA. *See e.g., Citizens for Fair Share v. Dept. of Corrections*, 117 Wn.

App. 411, 431, 72 P.3d 206 (2003) (failure to provide withholding index); *Doe I*, 80 Wn. App. at 303-04 (delay in responding to request for records and failing to provide requestor “fullest assistance”).

As stated above, there is no dispute between the parties that The Kitsap Sun is the “prevailing party” in the PRA enforcement action, especially under the current standard articulated in *Spokane Research*. The Kitsap Sun obtained a judgment in its favor, the records were released, the court properly concluded the requested records should have been disclosed upon request because they were not exempt (not in dispute), and The Kitsap Sun’s suit was reasonably necessary to obtain access to the records (particularly in light of the fact that both the County and the Guilds believed the records were exempt).

Instead, the County argues that it *too* prevailed because—in the injunction case—the injunction (that it did not oppose) was lifted by the work of the Kitsap Sun. *See* Brief of Appll. at 13. However, for the reasons set forth below, the County’s argument that it is also a prevailing party is without merit.

3. The County did not prevail

The County’s argument that it is also a prevailing party is flawed for several reasons. First, the County capitulated twice to the injunctions filed “against” it. *See* CP 10 (County Answer to Guilds’ Petition for

Declaratory Judgment and Preliminary Injunctive Relief) at ¶ 3.3 (County fails to respond at all to the Guilds' request for preliminary injunction); *see also* CP 168 (County "has no objection" to the Guilds' summary judgment motion seeking permanent injunction). The County capitulated in every way to the Guilds' attempts to prevent disclosure to The Kitsap Sun. This makes sense because the County did not want to disclose records it had already explicitly stated to the Kitsap Sun that it believed to be exempt. The interests of the County and the Guilds were thus aligned—and the polar opposite of The Kitsap Sun's interest. It cannot be in dispute that to "prevail" over a party, one must have "adverse" interests in the first place.⁶ The County and the Guild did not have "adverse" interests; they had the same or similar interests. Thus, the County did not "prevail" over the Guilds.

Second, it should be noted that the County is focusing only on one of the two cases decided by the trial court. The trial court ruled not only on the injunctive case brought by the Guilds, but also the PRA enforcement action brought by the Kitsap Sun. The County

⁶ *See* Black's Law Dictionary 58 (8th ed. 2004) (defining the term "adverse" as "against; opposed (to); having an opposite or contrary interest, concern, or position; [c]ontrary (to) or in opposition (to); hostile."). It is axiomatic in Washington that courts—particularly in PRA cases—may turn to legal dictionaries to help interpret statutory language, or give meaning to everyday words. *See Rental Housing Ass'n v. City of Des Moines*, 165 Wn.2d 525, 554, 199 P.3d 393 (2009) ("*RHA*") (turning to the dictionary definition of "claim") (Madsen, J. dissent); *see also Servais v. Port of Bellingham*, 72 Wn. App. 183, 189, 864 P.2d 4 (1993) (court using dictionary definitions in PRA case).

unquestionably lost the PRA enforcement action; there is no conceivable argument otherwise. The County, for obvious reasons, wants this Court to only look at the first case and ignore the PRA enforcement action.

Third, the County's argument is completely contrary to *Doe I*, *supra*, which has not been overruled (nor does the County argue so). In *Doe I*, the agency argued that because it had consistently argued in *favor* of disclosure, and the injunction filed against it by a third-party was lifted after the intervening requester prevailed at trial, the agency "should not be required to pay fees and penalties to another prevailing party." 80 Wn. App. at 302. Separate from the issue of whether the agency violated the PRA by delaying disclosure pursuant to the third-party notification statute, the appellate court ruled, as a threshold matter, that a requester bringing suit to obtain access to the records and an agency waiting for a court to determine whether records are exempt or not are not in the same position: "The parties were not representing the same interests, and (at least in the context of the issue before the court here) *both cannot be prevailing parties.*" *Id.* at 303 (emphasis added). This was the *Doe I* court's conclusion even when the agency in that case agreed to disclose the records—a requestor and an agency waiting to see what a court will order do not have the same interests and so both cannot be the prevailing parties. *See id.* at 299.

Here, the County had no intention of ever releasing the records absent a suit from The Kitsap Sun and thus cannot conceivably be seen as having aligned interests. This is exactly what the trial court concluded. CP 339 (ruling that it was “not likely” that the records would have been disclosed if not for The Kitsap Sun’s opposition). The Court here should likewise reject the County’s near-identical argument that it is a “prevailing party.” The County capitulated to the Guilds, lost the PRA enforcement action, and now claims it “prevailed” in the Guilds’ case (but never discusses the PRA enforcement action). This is not “prevailing.” It is defeat.

4. Kitsap Sun Prevailed Against the County

There are three central reasons why the Kitsap Sun prevailed against the County in the PRA enforcement action (the case on appeal) and was thus entitled to the mandatory attorney fees, costs, and daily penalties under the PRA.

a) The County has a positive duty to provide all identifiable, non-exempt public records if they are requested

The County had a “positive duty” to provide all the non-exempt public records that were requested by The Kitsap Sun, and had “the burden of establishing of establishing either that disclosure of requested document is not required or is exempt in whole or in part.” *Concerned*

Ratepayers v. Pub. Util. Dist. No. 1, 138 Wn.2d 950, 958, 983 P.2d 635 (1999) (citation omitted). *See also Hearst v. Hoppe*, 93 Wn.2d 123, 130, 580 P.2d 246 (1978) (“The statutory scheme establishes a positive duty to disclose public records unless they fall within the specific exemptions.”). *See Progressive Animal Welfare Society v. Univ. of Washington*, 114 Wn.2d 677, 682-83, 790 P.2d 604 (1990) (“*PAWS I*”) (same) (citing *Hearst*); *see also Wood v. Lowe*, 102 Wn. App. 872, 876, 10 P.3d 494 (2000) (same) (citing *PAWS I*). The County has admitted that it has this duty. *See* RP 30. When the County had “no objection” (CP 168) to the withholding of the very records it has a positive duty to disclose, that was the same as the County declaring that it thought the records were exempt from disclosure. And it did—explicitly. *See* CP 65 (August 15, 2008 pre-lawsuit letter where agency stated “we believe [the records] are exempt”).

The “positive duty” to disclose is a tie-breaker that prevents agencies from being “neutral.” An agency has exactly two choices relating to an exemption from disclosure when it processes a public records request: (1) agree to disclose non-exempt public records, or (2) deny the request and provide an explanation of why. *See* RCW 42.56.070(1) (“Each agency ... shall make available for public inspection and copying all public records, unless the record falls within [an

exemption from disclosure”); RCW 42.56.210(3) (requirement to provide explanation to requestor of basis for withholding).

The PRA provides a mechanism for an agency to do what the County claims it was doing (getting a ruling on the disclosure of the records)—but with a hitch. If an agency does not know whether the record is exempt or not, it can go to court and obtain a judicial determination of disclosability—if, and only if, it first denies the request. *See Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 754-55, 174 P.3d 60 (2007) (“the agency *denying* the record” may seek judicial review by filing an injunctive case) (emphasis added). This merely emphasizes that an agency must either agree to disclose or deny the request. There is no middle ground of “neutral.” After all, it would make no sense for an agency to seek an injunction under RCW 42.56.540 without a substantive basis for that injunction—*i.e.*, it believes the record is exempt from disclosure. This makes sense because if the agency denies the request and seeks judicial guidance, it is still liable for attorneys’ fees, costs, and penalties, so it must factor that disincentive into its decision to withhold the record. As described, *infra*, that is exactly how the incentives and disincentives to agencies are structured by the PRA.

b) The County cited two exemptions in response to the Kitsap Sun's request

A critical fact in this case—and one understandably sparsely addressed by the County in its Brief—is the fact that the County claimed two exemptions from disclosure to the Kitsap Sun prior to the Guilds' seeking an injunction. At first, the County said it did not know if the records were exempt or not. CP 142; CP 152. However, from its initial response expressing merely a lack of certainty about the application of an exemption, the County then asserted two exemptions in a later communication—before any lawsuit was filed by any party. *See* CP 65. The County unequivocally stated in its August 15, 2008 letter to Brody “we believe that employees’ town of residence is exempt under RCW 42.56.250 and RCW 42.56.050[.]” *Id.* Then the County stated that it would decide whether *the County* would seek declaratory or injunctive relief to block disclosure. CP 152 (“[T]he *County* may file a declaratory judgment action and ask the court whether employees’ ‘town of residence’ is exempt from disclosure.”) (emphasis added). After being warned of the potential disclosure of the towns of residences, and after being told that the County believed the towns of residence could be exempt from disclosure, the Guilds filed suit a week later. CP 4-8.

The County argues that it did not cite an exemption but only stated that it was “not clear” whether the records were exempt. Br. of Appl. at 26. This is, at best, an incomplete portrayal of the relevant record. The August 15, 2008 letter could not have been clearer that the agency was withholding the records because they believed them to be exempt. There is no ambiguity in this statement by the County: “we believe that employees’ town of residence is exempt under RCW 42.56.250 and RCW 42.56.050.” CP 65.

In order to argue that it never claimed an exemption from disclosure, the County must explain away the August 15, 2008 letter as not being a claim of exemption, but only a citation of an exemption “that might apply.” To attempt to do so, the County makes an odd claim that it is somehow unclear if the citation of an exemption in “correspondence” is an “opposition to disclosure.” See Br. of Appl. at 31 n.12 (stating that neither *Bellevue John Does* or *Confederated Tribes* considered whether citing an exemption in correspondence, “or not objecting to an injunction were ‘opposition to disclosure’”).⁷

⁷ This argument also suggests that a valid claim of exemption cannot occur in “correspondence” to the requester. To the extent the County argues this, it is mistaken. Agencies claim exemptions in correspondence all the time; in fact, it is the most common method of doing so. See *RHA*, 165 Wn.2d at 528 (agency citing multiple exemption in a cover letter responding to request); see also *Amren v. City of Kalama*, 131 Wn.2d 25, 38 n.11, 929 P.3d 389 (1997) (indicating that City Attorney in that case denied the request initially by letter); *Koenig v. Pierce County*, ___ Wn. App. ___, 211 P.3d 423, 425 (2009) (indicating that deputy prosecutor claimed multiple records exempt as work

In sum, the County cited two exemptions in a letter to the requester prior to the filing of either suit. CP 65. The County attempts to pigeonhole the relevant inquiry into whether the agency resisted disclosure *at trial*. However, no case law holds that that is the only relevant time frame—in fact, quite the opposite. *See, e.g., Confederated Tribes*, 135 Wn.2d at 742 (“[The agency’s] position *since the time of the request*, has been that the records ... are ‘public records’ and are subject to disclosure under the [PRA].”) (emphasis added). Again, the relevant inquiry is whether the agency resisted disclosure of the records—if it does, it is by definition adverse to the requester.

By claiming exemptions from disclosure—but having a court decide otherwise in a suit brought by the Kitsap Sun against the County—the Kitsap Sun prevailed against the County.

c) The trial court’s rulings as to prevailing party and fees is in accordance with *Confederated Tribes* and *Bellevue John Does*

In its Brief, the County repeatedly relies upon an erroneous and incomplete analysis of *Confederated Tribes* and *Bellevue John Does* in support of its argument that a prevailing requester cannot obtain attorneys’

product by letter); *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 475, 987 P.2d 620 (1999) (“the Department officially responded by letter [.]”).

fees, costs, and penalties in the context of an action brought by a third party to prevent disclosure.

Despite the County's claims, the fact that the agency in *Confederated Tribes* clearly aligned itself with the requester—thus arguing in *favor* of disclosure against the wishes of the third parties who sought an injunction—was central to the Court's conclusion that fees and penalties should not be assessed against the agency. Specifically, the Court ruled that:

[RCW 42.56.550(3)] does not authorize an award of attorney fees in an action brought by a private party, pursuant to [RCW 42.56.540], to prevent disclosure of public records held by an agency *where the agency has **agreed** to release the records but is prevented from doing so by court order.*

135 Wn.2d at 757 (emphasis added). The fact that the County in this case never agreed to disclosure cannot be disputed; instead, the County claimed the records were exempt from disclosure, indicated that it was willing to bring an injunction to block release of the records, and later stipulated to both a temporary and permanent injunction against disclosure. This is not agreeing to disclosure.

Although the County studiously avoids the above italicized portion of the *Confederate Tribes* ruling, instead focusing only on the portion related to where an action was brought by a third-party to prevent disclosure, the fact that the agency agreed to disclosure was integral to the

Court's analysis and conclusion. A reading of the case indicates that the County is mistaken to claim that the agency's position on the disclosure of the records is irrelevant. Just the opposite. Under the Court's reasoning in *Confederated Tribes*, a conclusion that the prevailing requester should not be entitled to fees and penalties made sense, since the agency not only "failed to object" to the Tribes' injunction, but actively argued in favor of disclosure at trial. *See id.* at 742 ("[The agency's] position since the time of the request, has been that the records ... are 'public records' and are subject to disclosure under the [PRA]."); *see also id.* at 751 (agency actively argued against the third party seeking to block disclosure). In light of the fact that the agency in *Confederated Tribes* agreed to disclosure but the County here did not, it is strange that the County would attempt to argue that "the County did not oppose disclosure any more than in *Confederated Tribes*." Br. of Appl. at 16. The County claimed exemptions and stipulated to injunctions preventing disclosure.⁸

The County also unjustifiably relies on *Confederated Tribes'* conclusion that not awarding fees and penalties to a prevailing requester is consistent with the broad mandate under the PRA for the simple fact that

⁸ Additionally, there is no indication that the *Confederated Tribes* Court intended to, nor did, overrule *Doe I* as to whether an agency could be a prevailing party when the requested records at issue are deemed not exempt after a third person brings a suit to block release of the records. Again, an agency that is merely acting as a "stakeholder", as argued by the state patrol in *Doe I*, and by the County here, cannot likewise be a prevailing party when the requester's action is successful.

awarding fees to a requester that was arguing alongside the agency would not encourage agencies to disclose upon request. In fact, the risk of potentially being liable for attorneys' fees and penalties for withholding records it believed to be disclosable—and that could later be found disclosable by a court—would likely have the result of the agency simply turning over the records upon request (relying on the immunity granted under the PRA contained in RCW 42.56.060) instead of alerting third parties that may be affected by the request under RCW 42.56.520.⁹ Contrary to the County's assertions, this is a wholly different scenario than the immediate case, where the agency cited two exemptions, invited a proxy to make its arguments for them at trial, and capitulated to that proxy's attempts to temporarily and then permanently enjoin release of the requested records so as to circumvent the PRA's explicit provisions granting mandatory attorneys' fees, costs and penalties.¹⁰

⁹ For the sake of clarity, agencies are not required notify third parties that a PRA request has been made that may affect them under RCW 42.56.520, which states only that agencies *may* seek additional time to notify the third persons. See *Vaughn v. Chung*, 119 Wn.2d 273, 281, 830 P.2d 668 (1992) (in interpreting meaning of court rule, Court reiterates the distinction between the permissive “may” and the mandatory “shall”).

¹⁰ Although *Confederated Tribes* is the controlling case in the context of the interplay between RCW 42.56.540 and .550(4), several of its legal conclusions are warranting of a revisit by the Court. In a dissenting opinion, former Chief Justice Durham concluded that the majority's opinion that the requestor was not the prevailing party against the agency was in error. 135 Wn.2d at 759-60. Justice Durham argues that the majority misinterpreted *Yakima Newspapers* in concluding that an individual cannot get attorneys' fees when an individual rather than an agency opposes disclosure of the records, because in that case, the newspaper sought attorney fees on appeal from the (non-agency) party arguing to block disclosure. *Id.* at 760; see also *supra*, Section IV, Part A, sub-section 1 for a summary of the relevant facts and conclusions in *Yakima Newspapers*. Here, argued

The County, however, relies even more so on the overruled *Bellevue John Does* case from Division I to support its position. *See* Br. of Appl. at 17-19, 30-33. This reliance is mistaken, as that case—as well as *Confederated Tribes*—only helps the Kitsap Sun’s arguments. First of all, there is no indication that the requester in *Bellevue John Does*, the Seattle Times, actually filed a PRA enforcement action adverse to the agencies. *See* 129 Wn. App. at 839. This makes sense in that the agencies gave no indication that it opposed disclosure. In actuality, there would be nothing to sue over, because when the agency does not oppose disclosure—such as by claiming an exemption—the requestor and agency have the same interests.

Justice Durham, the requestor sought fees for the whole action, and not against a non-agency—more importantly, because the agency did not immediately disclose the records upon request, the requestor prevailed in court against the agency. *Id.* at 760-61. In another respect, the conclusion of the *Confederated Tribes* Court that its interpretation of RCW 42.56.550(4) precluding a prevailing requester from obtaining attorney fees, costs and penalties when a third party seeks an injunction blocking an agency that would otherwise provide the records is “consistent” with the purpose of the attorney fee provision is questionable as well. To support its conclusion, the *Confederated Tribes* Court cited its rule in *Lindberg v. Kitsap County*, 133 Wn.2d 729, 746, 948 P.2d 805 (1997)—however, that page of *Lindberg* does not discuss the third-party injunction statute, and in fact, contains a facially incorrect misstatement of the law. *See id.* (*Lindberg* Court stating that the “[PRA] gives the trial court discretion to award costs, attorney fees, and a statutory penalty of \$5.00 to \$100.00 for each day a requester is ‘denied the right to inspect or copy [a] public record’ to which the requester is entitled.” It is axiomatic that an award of attorney fees, costs, and penalties is not discretionary whatsoever, but mandatory. *See King County v. Sheehan*, 114 Wn.2d 325, 354, 57 P.3d 307 (2002); *see also Amren*, 131 Wn.2d at 35-38. Obviously, this Court is not in a position to overrule *Confederated Tribes*, and the Newspaper believes its rule—as it currently stands—is dispositive nonetheless in its favor.

As previously shown, the Kitsap Sun filed a separate PRA enforcement case directly adverse to the County, and made it crystal clear that it was not suing the Guilds in doing so. *See* CP 71 (Complaint at ¶ 15). While the Kitsap Sun did intervene in the initial action, as the Seattle Times did in *Bellevue John Does*, that intervention was only for the purposes of asserting that the records are not exempt. The complaint brought by the Kitsap Sun is the case in which attorneys’ fees, costs, and penalties were awarded. This is relevant in that the *Bellevue John Does* court concluded in not awarding attorneys’ fees and costs to the prevailing requester that the agencies “were not adverse to the [requestor]”—a conclusion that simply cannot apply here for the myriad of reasons described above. 129 Wn. App. at 866.

Second, and more importantly, the appellate court in *Bellevue John Does*, in denying attorneys’ fees and penalties to the Seattle Times, cited the above rule from *Confederated Tribes*, that “attorney fees are not available under [RCW 42.56.550(4)] ‘where the agency has *agreed* to release the records but is prevented from doing so by court order.’” 129 Wn. App. at 864 (citation omitted) (emphasis added). Again, the appellate court recognized the aspect of *Confederated Tribes*’ holding that the County avoids: the agency must agree to disclose the records (if not for the injunction brought by the third party). Only if it “agrees to

disclose” will an agency bypass the mandatory fee and penalty provision of the PRA if a court rules the records the agency failed to provide not exempt. Again, this is the part of *Confederate Tribes* the County ignores.

The *Bellevue John Does* court went even further, in fact, citing as crucial the fact that in *Confederated Tribes*, the agency specifically did not resist disclosure—only the third parties seeking the injunction did. 129 Wn. App. at 864 (citing *Confederated Tribes*, 135 Wn.2d at 757). The appellate court in *Bellevue John Does* cited the trial court’s conclusion that *Confederated Tribes* was controlling—specifically, due to the fact that “the agencies involved, the School Districts, did not oppose the Times’ request; the opposition came from the individual teachers involved.” 129 Wn. App. at 864-65. The main focus of the *Bellevue John Does* trial court, as affirmed by the appellate court, is that the agencies did not oppose release of the records in court—meaning, if not for the teachers’ injunction, the agencies would have released the records. *See id.* at 865-66 (trial court finding it not relevant that there was evidence that the school districts were hostile to the request because, in part, “during the proceedings the school districts *were not adverse parties* to the Times”) (emphasis added). The appellate court later confirmed this conclusion. *See id.* at 866 (“The record confirms that the school districts did not oppose the Times’ disclosure request in court.”).

In wake of these facts, the appellate court in *Bellevue John Does* clearly believed it dispositive that the agencies did not oppose disclosure in denying a prevailing requester attorney fees, costs and penalties. In the immediate case, as already shown, the County cited exemptions in its initial response, making clear that it believed the records to be exempt—a fact not present in *Confederated Tribes* nor *Bellevue John Does*. Moreover, the County here told the affected employees that it would consider suing on their behalf if they objected to the release of the records. CP 152 (“[T]he *County* may file a declaratory judgment action and ask the court whether employees’ ‘town of residence’ is exempt from disclosure.”) (emphasis added). The only way to interpret this is that the County was either going to sue to block the records, or was inviting the employees (including the Guild that has as members all the deputy prosecutors in Kitsap County that would bring the case) to argue its case. See CP 17 (Guilds stating that all the County’s Deputy Prosecutors were members of Guild). Further, the County here—on two occasions—capitulated to temporary and then permanent injunctions brought by the third parties blocking disclosure of the records it believed exempt. Agency capitulation to an injunction against disclosure is also not a fact present in either *Confederated Tribes* or *Bellevue John Does*. Either way, it is inconceivable to argue that the County either “agreed” to disclose the

records as contemplated by *Confederated Tribes*, or was not adverse to The Kitsap Sun in agreeing to injunctions blocking disclosure as contemplated by *Bellevue John Does*.

D. Accepting the County’s Interpretation of RCW 42.56.550(4) Would Undermine the Entire Policy and Purpose of the PRA

1. Purpose and policy of PRA

It bears repeating that in considering the parties’ respective arguments, this Court must take into account the unusually strong purpose and policy of providing access under the PRA. *See* RCW 42.56.550(3) (“Courts *shall* take into account the policy of this chapter that free and open examination of public records is in the public interest [.]”) (emphasis added). The Supreme Court of Washington interprets the PRA as “‘a strongly worded mandate for broad disclosure of public records.’” *Amren*, 131 Wn.2d at 31 (quoting *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“PAWS II”). “The stated purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of the public officials and institutions.” *Id.* Further, when legislation derives from popular initiative, as the PRA does, “the court’s purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity,

enacted the measure.” *Bellevue John Does*, 164 Wn.2d at 210. The collective intent of the voters could not be clearer in the legislative policy statement expressly provided in the PRA itself:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to ensure that the public interest will be fully protected [.]

RCW 42.56.030. Indeed, the State Supreme Court in *PAWS II* further stated that:

Without tools such as the Public Records Act, government of the people, by the people, for the people, risk becoming government of the people, by the bureaucrats, for the special interests.

PAWS II, 125 Wn.2d at 251. It must be agreed that this is an unusually strong policy statement by the Court.

Moreover, in light of this express purpose, a reviewing court must construe the disclosure provisions of the PRA liberally, and “view with caution any interpretation that would frustrate its purpose.” *Kleven v. City of Des Moines*, 111 Wn. App. 284, 289-90, 44 P.3d 887 (2002) (citations omitted); *see also Sheehan*, 114 Wn. App. at 338 (noting the fact that the PRA contains a “thrice-repeated legislative mandate that exemptions under the [PRA] are to be narrowly construed.”).

Further, “[a]dministrative inconvenience or difficulty does not excuse strict compliance with the PRA.” *RHA*, 165 Wn.2d at 535 (citation omitted). Strict compliance with the disclosure provisions of the PRA is required—substantial compliance is insufficient. *See Zink v. City of Mesa*, 140 Wn. App. 328, 340, 166 P.3d 738, 747 (2007) (“We therefore hold that the trial court erred when it concluded substantial compliance with PDA provisions was sufficient.”).

2. All provisions of the PRA are interpreted in favor of disclosure

With this policy in mind, a reviewing court must “look at the Act in its entirety in order to enforce the law's overall purpose.” *RHA*, 165 Wn.2d at 536 (citing *Ockerman v. King County Dep't of Developmental & Env'tl. Servs.*, 102 Wn. App. 212, 217, 6 P.3d 1214 (2000)). There are multiple ways in which the PRA expressly encourages—if not mandates—that disclosure be the default position of the responding agency.

3. PRA Incentives for Agencies to Disclose

The PRA provides several concrete incentives for an agency to disclose the requested records.

a) Exemptions Construed Narrowly

First, all exemptions are to be construed narrowly, and all disclosure provisions are construed broadly. RCW 42.56.030; *see also*

PAWS II, 125 Wn.2d at 251. In addition, exemptions are permissive, and not mandatory. 1980 Op. Att’y Gen. No. 1 at 5.

b) Burden of Proof is on Agency to Justify Withholding

Second, the PRA specifies that in any court action challenging the agency’s decision to withhold requested records or the agency’s estimation of time to respond to the request, the burden is on the agency of proving that it complied with the act. RCW 42.56.550(1); *see also RHA*, 165 Wn.2d at 535. Moreover, the court’s review of the agency’s actions is *de novo*, meaning there is no deference to the agency’s interpretation or action. RCW 42.56.550(3); *see also Servais v. Port of Bellingham*, 127 Wn.2d at 820, 904 P.2d 1124 (1995) (agencies are not allowed to be the bodies that decide what records are exempt, as “leaving interpretation of the act to those to whom it was aimed at would be the most direct course to its devitalization”) (quoting *Hearst*, 90 Wn.2d at 131).

c) PRA Provides Agencies Immunity to Third Parties for Releasing Records

Third, an additional incentive for disclosure is RCW 42.56.060, which provides immunity to any public agency or official that provides records under the PRA in a good faith attempt to comply with the statute. *See Ames v. Fircrest*, 71 Wn. App. 284, 290 n.2, 857 P.3d 1083 (1993); *see also WAC 44-14-01003* (Attorney General’s non-binding Model Rules

for Public Records) (describing RCW 42.56.060 as “[a]n additional incentive for disclosure”). The County’s initial claim that it was concerned about tort liability to its employees for disclosure of the records (CP 142) was thus misplaced.¹¹ RCW 42.56.060 encourages agencies to disclose requested records without fearing that it is making a mistake and subjecting itself to civil liabilities.

**d) Attorneys’ Fees, Costs, and Penalties
Create a Strong Incentive to Disclose**

However, and most importantly, the mandatory award of attorneys’ fees, costs, and penalties in RCW 42.56.550(4) is the strongest incentive to disclose. *See COGS*, 59 Wn. at 863 (award of attorneys’ fees an “incentive” for agencies to comply).

The purpose of the mandatory attorney’s fee provision is to encourage broad disclosure and to deter agencies from improperly denying access to public records. *Confederated Tribes*, 135 Wn.2d at 757 (citation omitted). Sometimes—like here—it requires hiring an attorney to obtain access to public records. Therefore, not allowing for recoveries of adequate attorney’s fees would necessarily impede access to public records and undermine the broad disclosure mandate of the PRA. *See, e.g., Spokane Research*, 155 Wn.2d at 104 (“[P]ermitting an agency to

¹¹ Since the County litigates PRA cases frequently, it is difficult to believe that the County’s counsel did not know of the PRA’s immunity provision.

avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit ... would undercut the policy behind the act.”) (citation omitted).

Accordingly, “permitting a liberal recovery” of attorney’s fees for a requestor in a PRA enforcement action “is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public’s right to access public records.” *ACLU v. Blaine Sch. Dist.*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999). In addition to making enforcement actions financially feasible, courts should consider the deterrent effect of such awards: “Strict enforcement of [the PRA’s punitive provisions] where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute.” *Hearst*, 90 Wn.2d at 140; *see also PAWS I*, 114 Wn.2d at 686 (only strict enforcement of the PRA’s attorney’s fee provisions “will discourage improper denial of access to public records.”).

In the immediate case, accepting the County’s argument would undermine the public’s ability to inspect disclosable public records and would neutralize every one of the above incentives for an agency to disclose. First of all, if requesters have no assurance that even when they are victorious against an agency that wrongfully withholds (but had a “third-party” make its argument for them) they still cannot have their

litigation expenses reimbursed, this will have a chilling effect on the average citizen's willingness to pursue litigation to obtain public records. Again, the purpose of the fees, costs, and penalties provisions is to make it "financially feasible" for the average member of the public to challenge agency withholding of records. *See ACLU II*, 95 Wn. App. at 115. Without the counterbalance of effective private counsel, the average layperson would be helpless against a government attorney; in other words, there would be little incentive to the average citizen to challenge an agency's decision to withhold if it believed that the agency would follow the steps of the County in this case. If the County's argument stands as law, it will incentivize public agencies to react to a public records request in exactly the same manner as the County did here and to thus shield themselves from the PRA's punitive provisions.

Moreover, this ruling will greatly hinder the public's ability to obtain access to the records related to the conduct of public employees because the agency could easily reach out to an employees' organization and solicit it to seek an injunction that the agency has no intention of fighting. The inevitable result would be a "friendly lawsuit" where both the employees' organization and agency have the same interests: preventing disclosure—with the added bonus that the requestor can never be compensated for obtaining the records. If a requestor chooses to risk

litigation, he or she will not be entitled to the fees, costs, and penalties incurred in vindicating the public's right because it was a "third-party" that sued to block disclosure. This proxy strategy could not be more contrary to the policy of the PRA.

Further, private lawyers would be much less likely to take PRA cases in general if this Court accepts the County's misinterpretation of the law. In many instances, PRA cases are taken on a contingency basis for the very fact that most of the individuals bringing the cases are normal citizens without the thousands of dollars to risk on a potentially unsuccessful case—exactly what the Legislature meant to encourage with the PRA's award of attorneys' fees, costs, and penalties. If agencies are able to do shield themselves under the cloak of a proxy, they will have no incentive whatsoever to disclose even records it believed were not exempt because they would know that few suits would be filed to obtain the records and, even if the requestor won, the requestor would still have significant legal costs.

In sum, if agencies were allowed to respond to a request for identifiable public records by first citing exemptions, soliciting their own employees to sue as a proxy "against" the agency to make the agencies' arguments, agree on two occasions to allow the records to be blocked from disclosure by stipulated court order, fail to argue in favor of disclosure in

open court (contra its “positive duty” under the PRA to do so), and then not be subject to the mandatory attorneys fees, costs and penalties if the records are later deemed disclosable (assuming the requestor can afford the litigation), the central mechanisms by which the PRA has any efficacy would be nullified.

The County’s main response to all of this is to say it did not want to make a mistake and release the records if they should not be disclosed.

However, it bears repeating that:

Agencies are sometimes placed in a difficult situation concerning the disclosure of documents that may violate a third-party right to privacy, rights under another law, or rights under the attorney-client privilege or rights under the work product doctrine. Yet, even when agencies are faced with the conflicting interests of complying with the act and protecting third party rights, *the act requires that court impose penalties for the wrongful withholding of documents.*

ACLU, 95 Wn. App. at 111 (emphasis added).

E. Kitsap Sun is Entitled to Attorneys’ Fees on Appeal

A party prevailing on appeal is also entitled to attorneys’ fees on appeal under the PRA. *See Tacoma News, Inc. v. Tacoma-Pierce County Health Dept.*, 55 Wn. App. 515, 525, 778 P.2d 1066 (1989); *see also Columbian Pub. Co. v. City of Vancouver*, 36 Wn. App. 25, 33, 671 P.2d 280 (1983). This Court should either remand to the trial court for a redetermination of reasonable attorneys’ fees, costs, and penalties, affirm

the trial court's ruling as to those amounts, or decide for itself what is appropriate. *See PAWS I*, 114 Wn.2d at 690 (discussing appellate court's options and determining that all of prevailing requestor's fee requests were "reasonable").

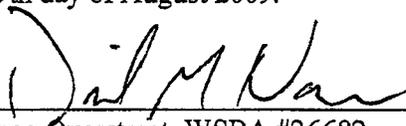
Respondent, assuming this Court deems it the prevailing party on appeal, reaffirms its request for an award of attorneys' fees and reasonable expenses incurred, under RCW 42.56.550(4), RAP 14.3 and RAP 18.1.

V. CONCLUSION

The trial court correctly determined that the Kitsap Sun was the prevailing party against the County and should be awarded its reasonable attorneys' fees, costs, and penalties. As shown above, the County's position is contrary to the explicit provisions and policy of the PRA, and the relevant case law controlling this case. This Court should affirm the trial court's ruling.

Respectfully submitted this 19th day of August 2009.

By: _____


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COURT OF APPEALS
DIVISION II

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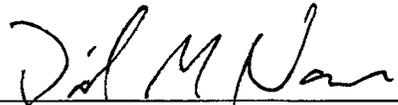
STATE OF WASHINGTON
BY cm
DEPUTY

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of
Washington that on August 19, 2009, I caused the delivery of the forgoing
Brief of Respondent via email and U.S. mail to:

Deborah A. Boe
Deputy Prosecuting Attorney
614 Division Street
Port Orchard, WA 98366

Dated this 19th day of August at Seattle, Washington.



David M. Norman