

No. 41497-0-II

FILED
STATE OF WASHINGTON
BY 
OFFICE

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

**ARTHUR WEST,
appellant**

**Vs.
DICK MARZANO, WPPA, et al
respondents**

**Appeal from the rulings of
the honorable Judges Hirsch and Casey**

APPELLANT WEST'S REPLY BRIEF

**Arthur West
120 State Ave N.E. #1497
Olympia, Washington, 98501**

TABLE OF CONTENTS

Table of Contents.....2

Table of Authorities.....2

I INTRODUCTION—Counsel repeatedly misrepresents the record as it exists in the form of Clerk's Papers and distorts existing precedent to confuse the issues and obstruct review of the actual issues presented by this case and to justify a bellicose pattern of improper and irrelevant attacks and counterclaims designed to obstruct review and harass the appellant

II ARGUMENT

1. Lake falsely asserts that no facts are in the record to support a Telford analysis, (in defiance of the answers to interrogatories appearing in the record) and completely ignores the coordination of administrative functions test employed by this Court, in an attempt to sidestep the issue of the public status of the WPPA.
2. Lake falsely asserts that no Open Public Meetings Act violation is alleged in the complaint in express denial of the clear language of sections 3.1, 3.2 and 3.3 of the Original Complaint.
3. Lake falsely implies that the WPPA's 11 Month delay in asserting exemptions and failure to identify individual records in the original exemption log was in compliance with the response requirement of RCW 42.56.520 in contravention of clear evidence that the WPPA failed to assert exemptions for 11 months and even then initially produced only a defective privilege log.
4. Lake falsely asserts that the issue of the WPPA's admitted deliberate, repeated destruction of valuable records in the absence of a records retention and destruction schedule, and the vague and perfunctory search and recovery effort of the WPPA do not present legitimate issues in what is a rapidly developing area of law.
5. Lake wastes the Court's and the appellants' time with a frivolous and partizan "restatement of the case" and a series of rabid attacks that fail to objectively set forth any actual facts, in violation of the Rules of Appellate Procedure that require a party to endeavor to present an unbiased case history, and which is interposed for improper purposes in violation of CR 11

III CONCLUSION.....19

TABLE OF AUTHORITIES

Bd. of Trustees v. Freedom of Info. Comm'n ,
181 Conn. 544, 436 A.2d 266, 270 (1980)

Clarke v. Tri-Cities, 144 Wn. App. 185 (2008).....

Eugster v. City of Spokane,
110 Wn. App. 212 , 39 P.3d 380 (2002)..

Hangartner v. City of Seattle, 151. Wn.2d 439, 90 P.3d 26 (2004)....

Neighborhood Alliance of Spokane County v.
County of Spokane No. 84108-0 ___ Wn. 2d ___,(2011)

PAWS v. University of Washington,
125 Wn.2d 243, 251, 884 P.2d 592 (1994).....

Spokane Research & Def. Fund. v. W. Cent. Dev.
Ass'n, 133 Wn. App. 602, at 607, (2006).....

Sanders v. State, 169 Wn.2d 827, 2010,

Telford v. Thurston County Commissioners
95 Wn. App. 149, 974 P.2d 886 (1999).....

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,
122 Wn.2d 299, 339, 858 P.2d 1054 (1993)

West v. WACO __ Wn. App. ___, (2011).....

Yick Wo v. Hopkins, 118 U. S. 374, 1886.....

Yousoufian v. Office of King County Executive
152 Wn.2d 421 at 424, (2004).....

Yousoufian v. Sims, 168 Wn.2d 444; 229 P.3d 735; (2010)

STATUTES

I INTRODUCTION--COUNSEL LAKE REPEATEDLY MISSTATES THE RECORD ON REVIEW AS IT APPEARS IN THE CLERK'S PAPERS AND DISTORTS APPLICABLE PRECEDENT TO OBSTRUCT FAIR AND ADEQUATE REVIEW ON THE ACTUAL ISSUES PRESENTED IN THIS CASE AND TO JUSTIFY A PATTERN OF RETALIATORY ATTACKS

Although in normal circumstances it is not necessary to emphasize that the issues argued are based upon the record on review, in this case the abnormal and unprecedented level of misrepresentation of this record by counsel and the malicious and vindictive animus evident in the series of attacks that characterize all of Ms. Lake's pleadings requires a reply.

Lake bases her over the top attacks and reply on "facts" that are wholly unsupported in the record. While a complete listing is impossible in the limitations of this brief, the worst and most glaring are as follows:

1. Lake falsely asserts that no facts are in the record to support a Telford analysis, (in defiance of the answers tpo interrogatories appearing in the record) and completely ignores the coordination of administrative functions test employed by this Court, in an attempt to sidestep the issue of the public status of the WPPA.

2. Lake falsely asserts that no Open Public Meetings Act violation is alleged in the complaint in express denial of the clear language of sections 3.1, 3.2 and 3.3 of the Original Complaint.

RCW 42.56.520

RCW 40.14

Laws of The State of Washington 1970 ex. s. Chapter 69 @ 1-3

.....

ARTICLES

Leslie marshall, Telford, Casting Sunlight on Shadow Governments-
Limits to the Delegation of government Power to Associations of
Officials and Agencies, SLR 24:107.....

3. Lake falsely implies that the WPPA's 11 Month delay in asserting exemptions and failure to identify individual records in the original exemption log was in compliance with the response requirement of RCW 42.56.520 in contravention of clear evidence that the WPPA failed to assert exemptions for 11 months and initially produced a defective privilege log.

4. Lake falsely asserts that the issue of the WPPA's admitted repeated and deliberate destruction of valuable records in the absence of a records retention and destruction schedule, and the vague and perfunctory search and recovery effort of the WPPA do not present legitimate issues in what is a rapidly developing area of law.

5. Lake waste's the Courts and the appellant's time with a frivolous and partizan "restatement of the case that fails to objectively set forth any actual facts in violation of the Rules of Appellate Procedure that require a party to endeavor to present an unbiased case history.

Due to the repeated and obvious misrepresentations of counsel, appellant is unsure what case Ms. Lake believes herself to be arguing, but it is obviously not the present case. Perhaps Lake's confusion may be the result of her completely improper attempt to base her arguments upon an

outdated, irrelevant and unpublished case, which she improperly appends to her defective brief.

Quite possibly, counsel Lake believes herself to be re-arguing a past case rather than responding to the actual complaint, issues and record in the present matter, and this may explain why Lake continues to falsify the record to conform to the unpublished authority that she, in violation of the RAP, has attempted to employ as the gravamen of her arguments in this appeal, despite the fundamental and undeniable disparities between the unpublished case Lake improperly cites to and the actual record and circumstances of the present case, which are apparent in the actual record on review.

While appellant sympathizes with Lake in what appears to be a pathological obsession with her (all too few) past glories, and despite the rapacious efficiency of lake's habitual go for the throat tactics, it is a sad and unavoidable circumstance that the objective reality of the actual circumstances of this appeal and the actual precedent applicable to PRA cases are the relevant and dispositive consideration necessary for a just determination of this case.

To the extent that Lake's attack-reply brief and scurrilous attendant onslaughts fail to address these circumstances and authorities, they must

be seen for what they are, a set of readily vicious reflexive attacks made for the purpose of muddying the waters and providing an entire scholl of red herrings to distract the Court from the issues of this case, which it must be recognized, stems from the WPPA, in its reply to the Original Complaint, denying that it was subject to the PRA and OPMA.

For counsel, (after having expressly denied in their reply t the complaint that the WPPA is subject to the sunshine laws) to attempt to deny that there is a case or controversy when clear violations of both the Open Public Meetings Act and the Public Records Act are asserted in the complaint and supported by clear and specific allegations is outrageous and underscores the basic reality of this case-that the WPPA will stoop to any level and make any form of rabid and unsupported assault to muddy the waters and evade a ruling that they are subject to the Sunshine laws, so as to continue to exercise the powers they now enjoy unchecked by any form of public accountability.

The WPPA also misrepresented material facts in violation of discovery rules and CR 11 when it suppressed the case and controversy apparent in the supplemental authority submitted by appellant in the form of the administrative determination of the Department of Retirement

services on the very issue of this case-whether the WPPA was a public entity.

II ARGUMENT

- 1. Lake falsely asserts that no facts are in the record to support a Telford analysis, and completely ignores the “coordination of administrative functions” test employed by this Court to sidestep the issue of the public status of the WPPA.**

Counsel's representations in her reply-attack brief at page 38-40 are completely false and demonstrate that counsel failed to review the record or (more probably) seeks to deliberately mislead this court.

As the voluminous clerk's papers cited in the opening brief demonstrate, with the numerous records disclosed by the WPPA itself in response to discovery, the record in the trial court and on review contain ample evidence of the WPPA's funding, composition, activities and creation, far in excess of that required to establish that under the Telford test, the WPPA qualifies as a public entity.

Obviously, in attempting to argue that no facts appear in the record, counsel has merely cut and pated an argument from a previous matter that has no bearing on the issues and facts of this case.

In addition, Counsel fails to make any response to the legal argument that as a State created body that coordinates administrative functions, the WPPA, like the WACO, is a public entity irrespective of any Telford test. See West v. WACO, ___ Wn. App. ___, (2011)

In so arguing, counsel fails to conform her vicious attack and reply to the facts and current precedent, and CR 11 sanctions are appropriate.

Contrary to the specious and deliberately misleading representations of counsel, ample evidence exists in the record to establish that the WPPA is a public entity entrusted with coordination of administrative functions under either the Telford or WACO test.

Counsel Lake obviously bases her reply on halucinaory facts and conditions that have absolutely no basis in the record serve only to support her improper attempt to rely upon an unpublished case to determine issues and justify scurilous attacks in a manner that pathologically and deliberately ignores any evidence to the contrary.

Were this the first instance where counsel Lake had substituted malice and misrepresentation of material facts for evidence and ignored clearly established precedent, it would be bad enough. However, like a broken instrument that is incapable of rendering but one note, counsel, continually brays the same anoying refrain: attack, attack, attack

2. Lake falsely asserts that no Open Public Meetings Act violation is alleged in the appellant's complaint in express denial of sections 3.1, 3.2 and 3.3 of the Original Complaint, and misrepresents the ruling of the Court on OPMA issues.

On page 24 of her attack and reply lake deliberately misrepresents a material fact appearing in the clerk's papers again, in stating that "Appellant fails to timely allege any actual violation of the Open Public Meetings Act by the WPPA, and therefore, failed to assert any facts upon which relief may be granted."

Again, counsel deliberately and egregiously misrepresents material facts appearing in the record, in this case at CP ____, sections 3.1-3.3 of the opening complaint.

3.1 On or about November 19 and 20, and on November 21, 2009, meetings were held of the governing board of the WPPA. These meetings were held in private, without publication or opportunity for the public to participate, and otherwise failed to comply with the Open Public Meetings Act

3.2 At the November 21 meeting the Board of Governors of the WPPA, including the named defendants (and other unknown defendants whose identification is not now possible due to the private nature of the meeting) took formal action in a number of manners, including the adoption of Resolution 2008-1.

3.3 As Resolution 2008-1, adopted by action of the governing body of the WPPA on November 21, 2008, clearly recognizes, the WPPA is a political subdivision of the State of Washington.

It is undeniable that counsel was aware of the allegations of the original complaint, yet she chose to falsify them in an attempt to obstruct justice and secure undue financial gain. Obviously, it is a waste of this Court's precious time to have to wade through Ms. Lake's deliberate falsifications of the record on review. Counsel's repeated wholesale falsification of the record are so egregious as to make a mockery of this Court and of the administration of justice as a whole.

Further, counsel deliberately misrepresents material facts in her brief when she attempts to assert that appellant made no argument on the OPMA issues, when appellant cited to the statute, the original session law and the case law which requires that the OPMA as a remedial statute, must be broadly construed. See *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (2002)..

The narrow standing rule adopted by the Court would eviscerate the OPMA and directly contradict the express language of the legislature that "any person" may bring an action under the OPMA. (See RCW 42.30.020) Regardless, the Court disposed of the OPMA issues on standing and refused to consider or determine the dispute factual issues of the specific violations asserted in the complaint, another fact that Lake fails to recognize, since it happened in the current case, not a previous one.

3. **Lake falsely implies that the WPPA's 11 Month delay in asserting exemptions and the WPPA's failure to identify individual records in the original exemption log was in compliance with the response requirement of RCW 42.56.520 in contravention of clear and undisputed evidence that the WPPA failed to assert exemptions for 11 months and initially produced a defective privilege log.**

Despite the fact that RCW 42.56.520 requires agency denials of public records to be made promptly where does Lake specifically deny the facts appearing clearly in the record that

(1) The WPPA failed to produce an exemption log in response to the original request for over 11 months, and

(2) the original exemption log was defective in that it failed to adequately identify individual records or provide brief explanations linked to each record.

Instead, counsel glosses over the violation of the act and again bares her fangs in yet another attack on the appellant for daring to assert that the WPPA might be subject to or have violated the PRA.

The failure of the WPPA to produce an exemption log in any form in response to West's June 2008 request for 11 months was a clear and undeniable violation of the PRA. (See West v. DNR __ wn. App. __,

(2011), upholding the 5 business day requirement for a response (and assertion of exemptions, see RCW 42.56.).

In addition, the Supreme Court recently held in *State v. Sanders*, that an incomplete exemption log was in and of itself a violation of the PRA....

Furthermore, we have consistently enforced the PRA's disclosure requirements to advance its policy of public access. See *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 269-71, 884 P.2d 592 (1994) (*PAWS II*) (declaring "silent withholding" illegal and noting that an "agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain"); *Rental Hous. Ass'n v. City of Des Moines*, 165 Wn.2d 525, 540, 199 P.3d 393 (2009) (relying on *PAWS II* to conclude that failure to require an indication of "whether there is a valid basis for a claimed exemption for an individual record" would "defeat[] the very purpose of the PRA"). Claimed exemptions cannot be vetted for validity if they are unexplained. Thus, AGO's failure to explain its claimed exemptions violated the PRA.

Similarly, in this case, even when the WPPA, after silently withholding records for 11 Months belatedly asserted exemptions, it failed to identify the individual records that the exemptions applied to, and continued to do so until the final and proper exemption log was insisted upon by the Court.

The WPPA also fails to recognize that the Court overbroadly applied the attorney client exemption in a manner broader than that allowed in Sanders v. State, which allowed only actual advice to be covered by the exemption, especially when not all of the records eventually identified in the exemption log were actual advice, but were only described as “communications” (See exemption log)

In Sanders, the Supreme Court employed

“...the narrow view of the attorney-client privilege advocated by Justice Sanders, and...”... reverse(d) the trial court's rulings that four documents were exempt.”...

As the Supreme Court recognized, in overturning the trial Court's overbroad interpretation of the exemption.....

. The cover e-mails neither reveal attorney thought processes about, nor are they relevant to, any pending, completed, or reasonably anticipated litigation to which the (respondent) was a party.

Such a narrow interpretation of the exemption claimed by the WPPA would result in many of the records being disclosed under the PRA.

Again, by dismissing the PRA issues out of hand, in violation of current case law and the actual record on review, Lake speaks not to the facts of the present case, but to the previous unreported case that she

believes is still before the Court, despite fundamental and obvious differences in issues and evidence.

- 4. Lake falsely asserts that the issue of the WPPA's admitted repeated and deliberate destruction of valuable records in the absence of a records retention and destruction schedule, and the vague and perfunctory search and recovery effort of the WPPA do not present legitimate issues in what is a rapidly developing area of Public disclosure law.**

While may be possible for the WPPA to attempt to allege compliance with the PRA by admitting that it repeatedly and deliberately destroyed the records of its CEO, and by the perfunctory “search” effort, (which, according to the WPPA's declarations consisted merely of attempting to log onto a computer), Counsel again misstates the existing law when she attempts to allege that the issues of destruction of records and the adequacy of any subsequent search to recover them are settled in the State of Washington, and their assertion by appellant is a basis for sanctions.

As the recent determination in *Neighborhood Alliance v. Spokane county* demonstrates, the issue of deliberate destruction of records and the adequacy of an agency's subsequent search in the context of Public

Records Act claims are far from settled in the State of Washington, and are instead, a rapidly evolving area of law.

As Chief justice Madsen noted, concurring in *Neighborhood Alliance...*

When a requester brings suit under FOIA and claims that an agency has failed to adequately respond to a public records request, the agency has the burden of establishing that its search for the requested records was adequate. *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 547 (6th Cir. 2001). The agency must show that it has made the required good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); accord *Batton v. Evers*, 598 F.3d 169, 177 (5th Cir. 2010); *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009); *Campbell*, 164 F.3d at 27; *Zemansky v. E.P.A.*, 767 F.2d 569 (9th Cir. 1985); *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *Wolf v. C.I.A.*, 569 F. Supp. 2d 1, 8 (D.D.C. 2008). Madsen, Concurring, in *Neighborhood Alliance v. Spokane County*,

In regard to the issue of whether repeated deliberate destruction of public records required to be retained under the records retention act, (despite recent clarification by this Court in the DNR case), the State

Supreme Court has yet to rule squarely on the issue of whether deliberate destruction of records that are required to be retained constitutes a violation of the PRA, with the BIAW case involving records of no retention value, and the DNR case involving an unpremeditated loss rather than deliberate destruction, (and incidentally a partially successful recovery effort far more exhaustive than that attested to by the WPPA).

Significantly, the WPPA completely failed to search its other computer accounts for communications from its executive director, although it is almost certain that a large number of both Erick Johnson and Patrick Jones' electronic communications were forwarded to or directly sent to other WPPA officers and would have been revealed by a search of the WPPA accounts as a whole.

Despite this obvious area for a productive search, the vague and perfunctory declaration of the WPPA does not reflect any such adequate search or any reasonable or diligent search of the WPPA computer network as a whole. (see Appendix I, Legal Landscape of Deleted Email Cases)

The complete failure of the WPPA to attempt a search of their computer network and other employee accounts for communications from their Executive Director demonstrated a lack of a diligent search and a lack of good faith, especially when it is inconceivable that none of his

communications were forwarded to other WPPA employees or officers and when no search of his frequent contacts was conducted..

The WPPA's lack of good faith is also attested to by their counsel's over the top misrepresentations of fact and law and attempts to replace a reasoned reply with vicious attacks more suited to a rabid pit bull on crack than an august attorney respectfully arguing a case before the appellate courts.

As federal cases show,An improper withholding may arise from an agency's failure to conduct an adequate search, which "is "dependent upon the circumstances of the case."The agency must make a good faith effort to conduct a search for the records requested. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998),,,(cited in *Neighborhood Alliance*)

The repeated attempts by WPPA counsel to misrepresent the facts and law and the complete absence of any evidence of a diligent or adequate search of the WPPA computer system as a whole, following what can only be described as repeated and deliberate destruction of public records of two successive Chief Executive Officers of the WPPA raises serious questions as to the good faith of the WPPA, especially when

its self described “scrubbing” of records demonstrateds an **intent** to obstruct any possible recovery effort.

However, it is a sad commentary on the conduct of **shadow** government associations that the manifest bad faith of the WPPA **can** also be observed in the demeanor of counsel Lake, who, instead of **attempting** to argue the facts and law in a professional and dispassionate **manner** has adopted a rabid, vicious pattern of over the top attacks and **wholesale** misrepresentation of the record and aplicable law.

No showing of any **diigent** search or recovery effort or any forensic recovery at all by the WPPA was made, and the WPPA's **excuse** that it was not a “fancy big agency” does not justify its repeated **intances** of deliberate destruction of significant public records and refusal to make a reasonable recovery effort. This set of facts requires an Order of **Remand** to compel just such a search. (See Neighborhood Alliance, supra)

5. Lake waste's the Courts and the appellant's time with a frivolous and partizan "restatement of the case" that is in violation of the rules of appellate procedure and made only to prejudice the Court with irrelevant ad hominem attacks.

Last, but certainly not least, Lake deliberately violates the Rules of Appellate Procedure by wasting everyone's time with a malicious and misleading "statement of the case" that is scurrilous and vindictive and makes absolutely no attempt to fairly portray the actual issues in the case, but which is merely a smoke and mirror attempt to introduce frivolous and material misrepresentations that are completely irrelevant to the issues of the case and which merely support Lake's policy of attack, attack, attack, and falsify the record and the law to support Lake's regular business practice of malicious and vicious attacks and attempts to surreptitiously assert causes of action for damages in violation of the Anti-SLAPP statute, RCW 4.24.510

This Court should strike the majority of Lake's Response-Attack Brief, (especially the scurrilous attempt at a deceptive "restatement of the case") which misstates material facts, fails to comply with the Rules of Appellate Procedure and which is obviously advanced with no purpose other than to harass the appellant and prejudice the court with irrelevant and vindictive ramblings of a profoundly vicious and maliciously animated

counsel, one who is apparently subject to a profound confusion as to which case and what record applies to the instant appeal-which confusion counsel refused to take time to eliminate prior to filing the most recent installment of her neverending series of baseless attacks and scurrilous allegations lacking any foundation in reality other than the confused ramblings of a deeply confused and maliciously animated, private association driven world view.

CONCLUSION

Ironically, as Leslie Marshall has recognized As Leslie Marshall recognized in her 2000 Law review article, , *Telford: Casting Sunlight on Shadow Governments—Limits to the Delegation of Government Power to Associations of Officials and Agencies* , 24 SEATTLE U. L. REV. 139 (2000).

These associations, acting as agents for government officials and other agencies, take actions officials themselves are not allowed to-in effect, becoming super agencies. These tax-funded associations, claiming to be free of public disclosure rules, antilobbying laws, open meeting law requirements, and one-person-one-vote constitutional restraints, have a significant, yet little noticed, potential to undermine basic democratic principles.

Increasingly, state government officials and agencies are delegating power to associations that set policies, pass resolutions, lobby, take legal positions in court, and use public funds in political campaigns and on ballot measures. The executive directors and others who run these associations are not elected by the public and are mostly unknown to the public. In many respects they now form an unaccountable, powerful, and mostly invisible new branch of government: shadow governments. Representative democracy depends on the ability of the people to hold their elected officials accountable for governmental actions, but when officials give public funds and delegate state powers to unelected associations, it becomes extraordinarily difficult for voters to determine whom to hold accountable.

In this case, not only are the executive directors of the WPPA unaccountable, powerful and mostly invisible, they act behind closed doors to conduct the people's business with impunity and do not scruple to deliberately destroy the evidence of their activities.

To add injury to insult, these entities believe themselves to be a law unto themselves and employ vicious pit bull type counsel such as Carolyn Lake to rabidly attack any mere citizen who might seek to challenge their clandestine hegemony.

When appellant West first contacted one of the WPPA's sister associations, he was informed, by Stan Finkelstein as part of an obscene

and abusive tirade, that "We are a Mega-Corporation with millions of dollars to run over ordinary citizens like you."

The vicious and hostile actions of WPPA counsel Lake, which have no basis in fact or law, are merely an extension of the inevitable abuse of authority that results from the secret exercise of unchecked power of the State by private entities like the WPPA.

Done January 3, 2012.

~~St Arthur West~~
ARTHUR WEST

CERTIFICATE OF SERVICE

I certify that this document was served on counsel for the WPPA by E-mail and mailed to the WPPA at their counsel's address of record on or before January 3, 2012.

Done June 3, 2011. I certify the foregoing to be correct and true.

~~St Arthur West~~
ARTHUR WEST

19 JUN 04 PM 1:14
STATE OF WASHINGTON
BY _____
DEPUTY

1. Legal Landscape of Deleted Email Cases.

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

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

b) Records retention statute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In a deleted email case, the main factual issue is the existence of things that have apparently been *destroyed*. The agency has all the information about how or whether it destroys its records; the requestor has none. This is why the burden of proof and ability to conduct discovery are so important in a deleted email case, and why the trial court's ruling will effectively prevent other requestors in deleted-email cases from enforcing the Public Records Act.