NO. 41834-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GEORGE E. NERVIK,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF LICENSING,

Respondent.

RESPONDENT'S BRIEF

ROBERT M. MCKENNA
Attorney General

ANTHONY P. PASINETTI
Assistant Attorney General
WSBA #34305
Attorneys for Appellant
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Phone: (206) 464-7676
Fax: (206) 389-2800
E-mail: LALSeaEF@atg.wa.gov

ORIGINAL

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I. INTRODUCTION

A requestor seeking records under the Public Records Act (PRA) must file suit within one year of the agency's final production of records. Otherwise, his suit is barred by the PRA's one-year statute of limitations. Here, Appellant George Nervik filed a lawsuit disputing in part compliance with a three-year-old request he made to the Department of Licensing. The superior court properly held, as a matter of law, that claims related to those requests were time-barred.

Additionally, the superior court properly concluded the Department did not refuse to provide Nervik with the records he specifically identified in his November 2008 requests because Nervik inspected an installment of the records produced in response to those requests, received a CD-ROM containing an installment of the responsive records, and was informed on October 2, 2009 that the final installment of responsive records would be available on October 8, 2009; Nervik, however, filed his lawsuit on October 6, 2009, which was two days before the final installment became available.

Therefore, the Department respectfully requests that this Court affirm the superior court's orders granting the Department judgment as a matter of law.

II. STATEMENT OF THE ISSUES

A. The Public Records Act (PRA) requires an individual who believes a government agency has denied him the opportunity to inspect and copy specific public records that he has requested to file an action within one year of the agency's last production of the requested records on a partial or installment basis. RCW 42.56.550(6).

Did the trial court properly dismiss on summary judgment the claims in Nervik's PRA lawsuit related to his December 2005/January 2006 request when the Department produced copies of the records he identified in that request in ten installments between February and April 2006 but Nervik did not file his lawsuit until October 2009?

B. The PRA requires disclosure by a government agency only when there has been a request for an "identifiable" public record. RCW 42.56.100. Thus, the PRA is violated only where an agency has refused to allow inspection of a specific public record or class of records. RCW 46.56.550.

Did the trial court properly dismiss on summary judgment the claims in Nervik's PRA lawsuit related to his November 2008 requests when the Department never refused to allow Nervik to inspect or copy the specific public records he requested, and Nervik did not specifically

request "metadata" when he sought copies of e-mails related to the director of the Department?

C. RAP 2.5(a) provides that appellate courts generally will not entertain issues not raised in the trial court. In responding to the Department's motions for summary judgment in the trial court, Nervik never sought to compel the Department to respond to any discovery requests, and he failed to challenge the reasonableness of the Department's investigative search for the records he requested or the copy fees as being excessive (in fact, he did not request any copies and was never charged any copy fees).

Did Nervik abandon his claim, made for the first time on appeal, that the Department's investigative search for the records he requested was unreasonable?

Did Nervik abandon his claim, made for the first time on appeal, that the Department charged him excessive copy fees?

Did Nervik abandon his claim, made for the first time on appeal, that the Department unlawfully failed to respond to his discovery request before the trial court dismissed his PRA lawsuit on summary judgment?

D. The PRA allows the court to award reasonable attorney fees to a person who prevails in an action to inspect a public record. RCW 42.56.550. Additionally, as a general rule, attorney fees are not available

to a non-lawyer, pro se litigant, even if the pro se litigant is successful on appeal.

Should the Court deny Nervik's request for attorney fees where he did not prevail in his legal action in the trial court and is not represented by counsel in his appeal?

III. STATEMENT OF THE CASE

Nervik has submitted over forty public records requests to the Department of Licensing since 2002. Clerk's Papers (CP) at 316, 318. This appeal involves three of those requests.

Nervik made the first of the three requests at issue in this appeal in a series of repeat, multi-part requests in December 2005 and January 2006. CP at 316-17, 319, 332, 336-37. 366-67. In that repeated request, Nervik asked for what amounted to copies of thousands of electronic mail messages (e-mails) from over 1,200 Department employee e-mail inboxes:

> [P]lease make available for my immediate review on CD-ROM a full and complete copy of each and every e-mail transmitted by, received by, copied to, blind copied to or making mention of Elizabeth A. Luce[1] on any computer

[1] Governor Christine Gregoire appointed Ms. Luce the Director of the Department of Licensing in March 2005.

> system or filing system owned, leased, operated, maintained or controlled by the State of Washington, for the dates December 30, 2005 and all dates prior.[2]

CP at 320, 332, 336-37, 366-67, 373.

Nervik informed the Department, on January 13, 2006, that while he preferred electronic media out of environmental concerns, he would be willing to review "standard paper hardcop[ies]" of the records. CP at 317, 337.

The Department notified Nervik on January 27, 2006, that the copies of e-mail records he requested would not be provided on CD-ROM. Rather, the records would be provided as "hard (paper) copies" because that format allowed for redaction of exempted information. CP at 318-19, 353, 357. Due to several factors, including the volume of potentially responsive records and number of e-mail mailboxes to be searched, the Department further informed Nervik that the search for responsive records would likely take many months. CP at 318, 352. Accordingly, the Department stated it would need time to determine a time estimate for

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[2] Along with copies of Ms. Luce's e-mails, Nervik also requested that the Department "please make available for [his] immediate review a full and complete copy of *each and every* payment check, paycheck, reimbursement check or any other payment ever made by the State of Washington . . . to [Director] Elizabeth A. Luce . . . [and former Director] Fred Stephens." CP at 333, 338-41, 361-65. The Department provided Nervik with those records in two installments on February 10 and 16, 2006. CP at 320-21, 374, 376. He viewed the paycheck records on March 10, 2006. CP at 323, 389-90. Nervik did not take issue with the Department's response to this request in his responses to the Department's motions for summary judgment.

retrieval, production, and redaction of the requested copies of e-mail records. CP at 318-19, 342, 373.

The Department notified Nervik on March 1, 2006 that it was purchasing new software that enabled searches of "servers, tapes, and mailboxes." CP at 322, 382. Therefore, while the Department would need time for "purchase, installation, retrieval, and evaluation of the records for exemptions", it "should be able to begin providing records for viewing and copying, at least on an installment basis, by March 22, 2006." CP at 322, 382. Nervik was informed on March 22, 2006 that the Department had retrieved all of the e-mail records and was currently evaluating them for exemptions. CP at 324, 391.

The Department responded to Nervik's first request in ten installments of paper records between February and April 2006. CP at 320-21, 324-26, 393, 397-99, 400-05. The Department notified Nervik each time a new installment was ready for viewing and copying. CP at 320-21, 324-26, 393, 397-99, 400-05.

The paper copies of the e-mail records filled six document storage boxes. CP at 327, 419. Nervik inspected the records in June 2006. CP at 328, 419. He did not request copies of any of the records after reviewing them. Rather, he sealed the boxes with packing tape and affixed a pre-printed label to each box that read: Thurston County

Superior Court George E. Nervik v. State of Washington Dept. of Licensing, et al. CP at 328-29, 419-24. He then left. CP at 419. On September 28, 2007, fifteen months after the Department produced the final installment of copies of the requested records, Nervik expressed to the Department how he had wanted the records the Department produced in response to his December 2005/January 2006 request in electronic format: "I want the Liz Luce emails in MS Outlook PST native format complete with all metadata". CP at 541.

On November 19, 2008, Nervik made the second PRA request that is at issue in this appeal to the Department:

> [P]lease make available for my immediate review on CD-ROM a full and complete copy of each and every email transmitted by, received by, copied to, blind copied to or making mention of Elizabeth A. Luce . . . . for the dates December 30, 2005 and all dates prior.

CP 656-57, 660. Nervik specifically requested that his second request be "treated independent and separate from any other such requests made by [him] of [the Department]." CP at 660.

One day later, on November 20, 2008, Nervik submitted the third PRA request at issue in this appeal to the Department. CP at 657, 661. Nervik's third request was nearly identical to the November 19, 2008 request except it sought copies of Elizabeth A. Luce-related e-mails "for the dates December 31, 2005 and all dates later up to and including

[November 20, 2008]." CP at 657, 660-61. In both requests and in subsequent correspondence with the Department, Nervik stated that "Emails should be in Outlook .pst format only together with all attachments same as previously provided." CP at 657-58, 660-61, 665.

During the ensuing five month period, the Department periodically updated Nervik on its progress in retrieving and when it estimated being able to produce the e-mail records he had requested in installments.[3] CP at 657-59, 662-63, 666-67. On April 29, 2009, the Department again updated Nervik about the status of their efforts to assemble the requested records and also informed Nervik that an installment of those records was available for his inspection:

> [W]e are holding 2,074 pages for your inspection. These are [December 31, 2005 and earlier] e-mails with attachments which were not "redactable" in electronic format . . . Additional e-mails created on or before December 31, 2005 are undergoing review for release to you on compact disc . . . Materials responsive to your request for records from January 1, 2006 forward have been assembled and are being reviewed. There are approximately 31,000 such records, many with

[3] The Department initially explained to Nervik that "while you would prefer to inspect [the requested records] in electronic format, the current lack of an approved redaction technology makes it impossible to provide electronic copies of e-mails and e-mail attachments, either for inspection or production." CP at 657, 662. However, on December 19, 2008, Nervik was notified the Department was "currently testing software to determine its efficacy to redact electronic records." CP at 658, 666. The redaction software did not redact records by itself; rather, the software only enabled the Department to prepare and produce requested e-mail records and any attachments to requesters on CD-ROM. CP at 658. The Department's Public Records unit personnel still had to go through each e-mail and any attachments to determine whether redaction or withholding was necessary. CP at 658.

> attachments. These will be released in batches as they become available . . . ."[4]

CP at 659, 668.

On May 13, 2009, Nervik was notified that a second installment of records were available: "a compact disc with [464 of] the Director's e-mails for [the period December 31, 2005 and earlier] which did not carry attachments". CP at 668, 671, 675-77. The Department again reminded Nervik that "[a]dditional e-mails will be provided in installments as soon as they have been reviewed." CP at 671, 675-76.

On May 29, 2009, Nervik picked up the CD from the Department. CP at 672. He was not charged any money for it. CP at 671, 675. Nervik returned to view the 2,074 printed e-mail records on June 1, 2009. CP at 672. While there, he did not ask for or pay the Department for any copies of any of the records. Rather, he took digital photos of the first printed e-mail and its attachment (eight pages) and the box they came out of. CP at 672. He then left. CP at 672.

During the next four months, a Department employee personally reviewed approximately 31,000 additional e-mails (not pages) that had been retrieved in response to both of Nervik's November 2008 requests. CP at 670, 672-73. Those records were compiled on six CDs using Adobe

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[4] Redaction/withholding logs were prepared for any e-mails that were redacted or withheld and then provided to Nervik. CP at 671-73.

Acrobat 9. CP at 673. The Department utilized Adobe Acrobat 9 because it allowed page numbering, redaction of records where necessary, and the ability to include links to attachments in any of the e-mails. CP at 670, 672-73.

On October 2, 2009, the Department informed Nervik that they had "nearly completed the review of the electronic records responsive to your request. These records will be provided to you on six CD/ROMs in electronic format (pdf). They will be ready next week, by Tuesday (10/8/09)." CP at 673, 682. The Department offered to mail the CDs to Nervik upon his request. CP at 673, 682.

On October 6, 2009, despite the October 2, 2009 correspondence, Nervik filed his PRA lawsuit. CP at 8. On October 15, 2009, the Department mailed Nervik the six CDs containing the remaining records responsive to his November 2008 requests. CR at 673-74, 683. Nervik was not charged any money for those CDs. In the letter accompanying the six CDs, the Department explained that the records were provided in .pdf file electronic format because Nervik's preferred electronic format (.pst) did not allow for redaction and page numbering. CR at 683.

The Department moved to dismiss Nervik's PRA lawsuit in two partial summary judgment motions.[5] CP at 301-424, 644-83. The first partial summary judgment motion was granted on the basis that Nervik did not file his lawsuit until more than three years after the Department produced the final installment of the records he requested in December 2005/January 2006. CP at 622-23.

The second summary judgment motion was granted because the Department never refused to produce the records Nervik had requested in his November 2008 requests; the Department was in the process of producing the remaining records when he filed his lawsuit in October 2009. CP at 758-59. Nervik appealed.[6]

IV. STANDARD OF REVIEW

This appeal involves two partial summary judgment orders that dismissed Nervik's PRA lawsuit. Summary judgment orders and challenges to agency actions under the PRA are reviewed de novo. *Greenhalgh v. Dep't of Corrections*, 160 Wn. App. 706, 713-14, 248 P.3d 150 (2011).

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[5] Nervik responded to both motions. CP at 425-601, 688-749. The Department submitted replies to each of Nervik's responses. CP at 602-606, 750-55.

[6] Nervik filed a motion for reconsideration of Judge Casey's second summary judgment order. CP at 754-795. The Department provided a response. CP at 800-805. Judge Casey denied Nervik's motion for reconsideration after Nervik appealed. CP at 832.

Appellate courts stand in the same position as the trial court where the record, as here, consists only of affidavits, memoranda, and other documentary evidence. *Greenhalgh*, 160 Wn. App. at 714. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *id.*

The courts consider all facts and reasonable inferences in the light most favorable to the nonmoving party. *Id.* Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment. *Id.* Once the moving party meets its burden to show that there is no genuine issue as to any material fact, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue as to a material fact exists. *Id.*

Thus, the sole question presented for determination is: Whether the pleadings and affidavits considered by the trial court raise any genuine issues of material fact upon which the outcome of Nervik's PRA lawsuit depends. *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 364, 324 P.2d 1113 (1958). However, if there exists no genuine issues of material fact and the Department is entitled to judgment

as a matter of law, the disposition made by the trial court must be upheld. *Id.*

V. ARGUMENT

A. The Trial Court properly dismissed the claims related to Nervik's December 2005/January 2006 public record request on summary judgment because those claims were time barred by the PRA's statute of limitations.

Under the PRA, an individual who believes he was denied the opportunity to inspect or copy a specific public record or class of records by an agency may bring an action in superior court to have the agency show cause why it has refused to allow inspection or copying of those records. RCW 42.56.550(1).

The individual must file his action within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW 42.56.550(6). RCW 42.56.550(6) acts as a limitations period barring certain actions, with the obvious purpose of setting a definite limit upon the time available to bring an action without consideration of the claim's underlying merit. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 378, 166 P.3d 662 (2007). A limitations period begins to run on a cause of action when the claim has "accrued." RCW 4.16.005.

Generally, a claim is said to accrue when a party has the right to enforce the cause of action and seek relief in the courts. *Gunnier v. Yakima Heart Center, Inc.*, 134 Wn.2d 854, 859, 953 P.2d 1162 (1998). Therefore, in the public records context, a cause of action accrues, and the one-year statute of limitations period is triggered, by one of two occurrences: (1) the agency's claim of an exemption or (2) the agency's last production of a record on a partial or installment basis. RCW 42.56.550(6).

An agency "produces" a document by making it available for inspection or copying. *Sanders v. State,* 169 Wn.2d 827, 836, 240 P.3d 120 (2010). A record is produced on a "partial or installment basis" when it is "part of a larger set of requested records . . . assembled or made ready for inspection or disclosure." RCW 42.56.080. Thus, by its terms, the "last production" prong is triggered by the last produced installment of requested records. *See* RCW 42.56.550(6).

The "last production" prong applies to Nervik's December 2005/January 2006 request because the Department produced the records in response to that request in ten installments between February 10, 2006 and April 27, 2006. CP at 320-21, 324-26, 374, 376, 393, 397-99, 400-05. The Department notified Nervik each time by letter when a new

installment was available for him to inspect and copy. CP at 320-21, 324-26, 374, 376, 393, 397-99, 400-05.

Pursuant to the "last production" prong, Nervik had one-year, or until April 27, 2007, to bring an action related to his December 2005/January 2006 request. He failed to do so. Instead, Nervik filed his lawsuit on October 6, 2009, which was over three years after the Department produced the last installment of the records he identified in that request in April 2006.

Since Nervik waited over three years to file his action, all claims arising out of his January 2005/December 2006 request are time-barred under the "last production" prong of the Act's statute of limitations provision. *See* RCW 46.56.550(6). Therefore, those claims were properly dismissed on summary judgment. CP at 622-23.

B. The Trial Court properly dismissed the claims related to Nervik's November 2008 public record requests on summary judgment because the Department never refused to provide the requested records and Nervik did not identify metadata as a specific record in his requests.

As mentioned in the previous section, an action under the PRA is appropriate when an agency has refused to permit an individual to inspect and copy a specific public record or class of records. RCW 42.56.550(1). For instance, a lawsuit may be necessary when an agency, by resisting disclosure of requested records, forces a requester to file an action.

Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-104, 117 P.3d 1117 (2005).

However, no lawsuit is necessary when, despite uncertainty about the time it may take to produce the requested records, an agency never indicates the requested records will not be forthcoming and the agency never fights to prevent disclosure or is otherwise obstinate in responding to the request. *Limstrom v. Ladenberg*, 98 Wn. App. 612, 617, 989 P.2d 1257 (1999). Where an agency provides the individual with a timeframe for providing the requested records, the agency should be allotted that amount of time to perform and provide those records before a lawsuit becomes necessary to compel production. *See Ladenburg*, 98 Wn. App. at 617; RCW 42.56.520 ("Additional time required to respond to a request may be based upon the need . . . to locate and assemble the information requested . . . or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.").

The Department never refused, either in writing or through its conduct, to respond to Nervik's November 2008 requests. CP at 656-57, 660-61. The Department never indicated that the requested records would not be forthcoming once staff had compiled them and determined which records should be redacted or withheld. Nor did the Department ever fight

to prevent disclosure or otherwise act obstinate or resistant towards Nervik's requests.

Rather, as authorized by the PRA, the Department repeatedly informed Nervik of its progress in retrieving and preparing the requested records for inspection and/or copying. *See* RCW 42.56.520; CP at 657-59, 662-63, 666-67, 673, 682. The Department then produced the requested records in installments as they were assembled and made ready for inspection. *See* RCW 42.56.080; CP at 659, 668, 670-74, 675-77, 683. Over 31,000 of those records (not pages) were made available to Nervik in electronic format as Adobe Acrobat .PDF files on CD-ROM. CP at 659, 668, 673, 682. Under these circumstances, the Department did not violate the PRA in responding to Nervik's November 2008 requests.

Nervik claims the Department's response was incomplete because he wanted, but did not receive, the metadata associated with the Elizabeth Luce-related e-mails he sought in his November 2008 PRA requests. Specifically, Nervik takes issue with the Department's decision to provide electronic copies of the e-mails on seven CD-ROMs as Adobe Acrobat .PDF files instead of as "Outlook .PST" files. Br. of Appellant, at 21, 25.

Nervik, however, is incorrect for two reasons. First, the Department was under no obligation to provide the copies of e-mail records in an electronic format, let alone the specific electronic format

requested by Nervik. *See Mitchell v. Dep't of Corrections*, -- Wn. App. --, ¶ 19, 260 P.3d 249 (2011) citing *Mechling v. City of Monroe*, 152 Wn. App. 830, 850, 222 P.3d 808 (2009).

The Department did decide, in its discretion, that it was reasonable and technologically feasible to provide the records to Nervik on the CD-ROMs as Adobe Acrobat .PDF files.[7] CP at 673-74; *see Mechling*, 152 Wn. App. at 850 (remanding matter to trial court to determine whether it was reasonable and technically feasible for agency to provide requested e-mail records in an electronic format). The Department was able to do so only after acquiring computer software (Adobe Acrobat) that eliminated the need to duplicate its efforts printing the records, redacting them, and then scanning them back into electronic format. Rather, Adobe Acrobat specifically allowed the Department to paginate and redact the records without printing prior to providing them to Nervik. CP 670, 672-73. Accordingly, the Department's decision to provide Nervik the records electronically on CD-ROMs as paginated and in some cases redacted .PDF files, while not required by the PRA, was appropriate.

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[7] Adobe Acrobat .PDF is an "electronic format that is used by the agency and is generally commercially available." WAC 44-14-050(2); *see also* WAC 44-14-05001 ("An agency should provide reasonably locatable electronic public records in either their original generally commercially available format (such as *an Acrobat PDF file*) . . .") (emphasis added).

Second, it is undisputed that Nervik never identified "metadata" in his November 2008 requests.[8] CP at 656-57, 660-61; Br. of Appellant at 21. Yet he was required to do so if he was truly interested in inspecting the metadata for any of those e-mail records. *See O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151-52, 240 P.3d 1149 (2010) (concluding that "metadata is a new topic that has never before been dealt with in PRA litigation, and . . . that a request for the metadata was not made until [requester] specifically asked for it.").

In *O'Neill*, the requester orally requested to see "that e-mail", which had been attributed to her at a city council meeting. *Id.* at 142. After receiving and viewing a printed copy of the e-mail, the requester then made a second request in writing to obtain:

> All information relating to the e-mail, including how it was received by [the Shoreline Deputy Mayor], from whom it was received, and the forwarding chain of the e-mail.

Id. at 143. After receiving a second response, the requester "explicitly" requested in writing:

> The metadata from the e-mail's entire chain, including "[all] metadata pertaining to the e-mail that [the original sender] had sent to [the Shoreline Deputy Mayor]."

Id.

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[8] Nervik did state, in his letter to the Department on September 28, 2007, that he had wanted the records the Department produced in response to his December 2005/January 2006 request in "MS Outlook PST native format complete with all metadata". CP at 541. However, that was fifteen months after the Department produced the last installment of records for that request. By that point, the one-year statute of limitations in RCW 42.56.550(6) had already run as to that request.

The Washington Supreme Court held that both the requested "e-mail" and the "metadata" embedded within that e-mail that was specifically identified in the requester's third request are public records and must be disclosed. *Id.* at 147.

However, with respect to the requester's first oral request to see "that email", the Court concluded "that a request for the metadata was not made until [the requester] specifically asked for it" in her third request.[9] *Id.* at 151-52.

Accordingly, under *O'Neill* it was incumbent on Nervik to specifically identify metadata as one of the records he was seeking to inspect in his November 2008 requests. As he recognizes in his opening brief, he never did so. Br. of Appellant at 21.

Under the above circumstances, the documentary evidence showed that the Department did not deny Nervik the opportunity to inspect or copy

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[9] In reaching its ruling, the Court noted that metadata has been defined as "data about data, or hidden statistical information about a document that is generated by a software program". *Id.* at 145 (citation omitted). Further, the Court stated that "'Metadata' is information describing the history, tracking, or management of an electronic document.'" *Id.* (citation omitted). Metadata from electronic files can include "'information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information).'" *Id.* at 146 (citation omitted). Examples of e-mail metadata "include, among about 1,200 or more properties, such information as the dates that mail was sent, received, replied to or forwarded, blind carbon copy ... information, and sender address book information." *Id.* (citation omitted).

the specific records he identified in his November 2008 requests. The trial court therefore properly granted summary judgment. CP at 758-759.

C. This Court should not consider any claims that Nervik did not raise in the Trial Court.

Rule of Appellate Procedure (RAP) 2.5(a) states the general rule for disposition of issues not raised in the trial court: subject to a few closely guarded exceptions, appellate courts will not entertain them. *State v. Nunez,* 160 Wn. App. 150, 157, 248 P.3d 103 (2011). In his appeal, Nervik has raised several issues that he did not raise in response to the Department's motions for summary judgment. The Court should not consider those issues on appeal because they do not meet any of the exceptions to the general rule of RAP 2.5(a).

1. Nervik did not challenge the Department's search for the records he requested in the Trial Court and has therefore abandoned that claim on appeal.

In his opening brief on appeal, Nervik challenges the reasonableness of the Department's search for the records he requested. Br. of Appellant, at 17-20. Nervik did not raise this issue in the trial court in response to the Department's motions for summary judgment. CP at 592-601, 737-749, 764-771. Rather, Nervik argued the Department failed to produce the records in the format he requested. Failing to object to the reasonableness of the Department's search before the trier of fact,

he has failed to preserve this issue for appeal. The Court should therefore decline to consider it for the first time on appeal. RAP 2.5(a).

Even if Nervik had raised this issue below, the documentary evidence established that the Department's search adequately uncovered all relevant documents. *See Neighborhood Alliance of Spokane County v. County of Spokane*, -- Wn.2d --, ¶ 24, 261 P.3d 119 (2011) (finding "adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents."). The Department purchased and utilized new software that enabled it to search its "servers, tapes, and [over 1,200 electronic] mailboxes" for the e-mail records Nervik requested. CP at 320, 322, 382. The Department then retrieved tens of thousands of responsive e-mails from those sources. CP at 324, 391, 659, 668. Nervik recognizes the adequacy of the Department's search in his opening brief, stating the Department "search[ed] the appropriate computers and/or electronic devices" and "found the email records identified by Nervik with no discernible difficulty". Br. of Appellant, at 24-25. Thus, Nervik's mere allegation of an inadequate search, raised for the first time on appeal, does not disclose an issue of material fact that precludes summary judgment.

2. Nervik did not claim he was charged excessive copy fees in the Trial Court and has therefore abandoned that claim on appeal.

In his opening brief on appeal, Nervik claims the trial court erred in finding he was not charged excessive copying fees. Br. of Appellant, at 6, 30. The trial court, however, made no such finding. CP at 622-23, 758-59. Nor did Nervik raise this issue in the trial court in response to the Department's motions for summary judgment. CP at 592-601, 737-49, 764-71. Because Nervik did not raise this issue below, the Court should decline to consider it for the first time on appeal. RAP 2.5(a).

Even if the Court were to consider this issue for the first time on appeal, the documentary evidence establishes Nervik was never charged any copying fees for the records the Department produced in response to the requests at issue in this appeal. Rather, after inspecting the records produced for his December 2005/January 2006 request, Nervik taped up the six boxes holding those records and then left. CP at 328-29, 419-24. Moreover, after he inspected a box of records produced for his November 2008 requests, Nervik took digital photos of some of the records and then left. CP at 672. He also received seven CD-ROMs that contained the remaining records for his November 2008 requests free of charge. CP at 671-74, 675, 683.

Thus, Nervik's mere allegation of excessive copying fees, raised for the first time on appeal, does not disclose an issue of material fact that precludes summary judgment.

3. Nervik did not claim he was denied discovery nor did he seek to compel the Department to respond to any discovery requests prior to the Department's motions for summary judgment.

In his opening brief on appeal, Nervik claims the trial court erred in not forcing the Department to answer his discovery requests and not allowing discovery prior to dismissing his lawsuit. Br. of Appellant, at 2-5, 29. While Nervik was entitled to discovery under Washington's civil discovery rules in his PRA lawsuit, *see Neighborhood Alliance*, -- Wn.2d at ¶ 17, he never raised the issue of his outstanding discovery requests in the trial court in response to the Department's motions for summary judgment.[10] CP at 592-601, 737-49, 764-71.

Nor did Nervik ever seek to continue either of the Department's motions or otherwise compel the Department to respond to his discovery requests prior to the Department's motions for summary judgment. *Neighborhood Alliance*, -- Wn. 2d at ¶¶ 8-9, 21-22 (finding trial court

[10] Nervik served the Department with Interrogatories and Requests for Production on or about December 28, 2009. CP at 67. The Department filed a motion for a protective order on February 10, 2010. CP at 41-99. The motion hearing was stricken after Nervik filed an affidavit of prejudice against the judge assigned to hear his lawsuit. The Department then proceeded with filing its two motions for summary judgment but did not renew its motion for a protective order with the new judge.

improperly denied requester's motion to compel and therefore erred by not allowing discovery to proceed).

Finally, discovery would not have made a difference in this case where Nervik's lawsuit was filed more than three years after the Department produced the records in response to his December 2005/January 2006 request and the Department did not refuse to provide Nervik with the specific records he identified in his November 2008 requests.

Because Nervik did not raise this discovery issue below, the Court should decline to consider it for the first time on appeal. RAP 2.5(a).

D. Pro se litigants are not entitled to attorney fees.

Nervik is not entitled to attorney fees. While he was represented by counsel at the trial court level, he did not prevail in his PRA action. The statute only allows for payment of fees to prevailing parties. RCW 42.56.550(4) ("Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record . . . shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.")

Furthermore, Nervik is proceeding as a non-lawyer, pro se litigant in his appeal. Attorney fees are not available to a non-lawyer, pro se litigant, even if the pro se litigant is successful on appeal. *In re Marriage*

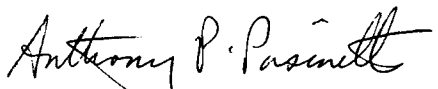
of Brown, 159 Wn. App. 931, 938, 247 P.3d 466 (2011). Accordingly, the Court should deny Nervik's request for attorney fees.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court affirm the trial court's orders granting summary judgment to the Department.

RESPECTFULLY SUBMITTED this 12 day of December, 2011.

ROBERT M. MCKENNA
Attorney General



ANTHONY P. PASINETTI,
WSBA #34305
Assistant Attorney General
Attorney General's Office
Licensing and Administrative Law Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7676

NO. 41834-7-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

FILED 12 DEC 13 PM 1:20 STATE OF WASHINGTON BY

GEORGE E. NERVIK, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF LICENSING, Respondent.	DECLARATION OF SERVICE

I, Roxanne Immel, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

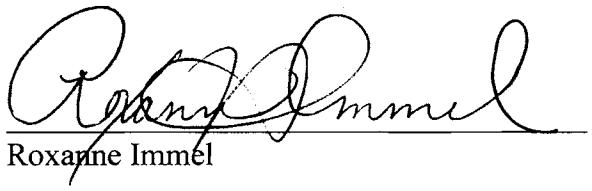
2. That on the 12 day of December 2011, I caused to be served by mailing a true and correct copy of **Respondent's Brief**, with proper postage affixed thereto to:

George Nervik
700 Sleater Kinney Road SE, Suite B-188
Olympia, WA 98503-1150

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

ORIGINAL

DATED this 12 day of December 2011, in Seattle, Washington.



Roxanne Immel