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Appellant Derek E. Gronquist files this reply to Respondent's Brief.

I. MR. GRONQUIST TENDERED DEPOSITION TRANSCRIPTS TO THE SUPERIOR COURT CLERK FOR FILING WHILE THE RECORD WAS OPEN, AND HIS RIGHT TO RELY UPON THAT EVIDENCE HAS BEEN OBSTRUCTED BY THE CLERK AND TRIAL COURT

Respondent Department of Licensing (DOL or Department) contends that the superior court clerk properly refused to file tendered deposition transcripts because "[w]hen Gronquist selected the transcripts as part of the record, the record was closed." Respondent's Brief at 18. This is incorrect. Mr. Gronquist tendered the deposition transcripts to the superior court clerk for filing on October 15, 2010, CP 211, and again on October 30, 2010. CP 215-216 & 218. This was almost two months before the summary judgment hearing and four months prior to entry of a final judgment. CP 163-164.

The Department goes on to make the contradictory statement: "Gronquist was not deprived of use of the deposition testimony in litigating the case below or in arguing this appeal." Respondent's Brief at 18. If these statements were true, the deposition transcripts would have been filed by the superior court clerk,

considered by the trial court, and transferred to this Court for appellate review. Contrary to the Department's unfounded allegations, the trial court expressly stated that it did not consider the transcripts; the superior court clerk refused to file the transcripts or transmit them to the appellate court; and the appellate court has deprived Mr. Gronquist of his right to rely upon the deposition transcripts on appeal. CP 218 & 221; Clerk Paper's Index at 3; Appellate Court Clerk's Order dated August 19, 2011 (refusing to file Mr. Gronquist's Opening Brief until all references to the deposition transcripts were removed); and Commissioner Schmidt's September 7, 2011, Ruling (affirming Clerk's Order).

II. THE DEPARTMENT DOES NOT DISPUTE THAT  
THE TRIAL COURT VIOLATED DUTIES  
REQUIRED BY CR 56 AND RCW 42.56.550(3)

The Department does not dispute, or even attempt to address, the trial court's failure to consider Mr. Gronquist's pleadings, memoranda, and evidence prior to granting summary judgment contrary to CR 56; or the trial court's failure to review all of the agency's actions de novo contrary to RCW 42.56.550(3). Compare Amended Opening Brief at 17-20, with Respondent's Brief

passim.

Because it is undisputed that the trial court violated standards of review required by CR 56 and RCW 42.56.550(3), this Court should reverse the trial court on all grounds and remand this case for a full and fair hearing before a different superior court judge.

III. THE DEPARTMENT DOES NOT DISPUTE THAT MR. GRONQUIST SHOULD HAVE BEEN AWARDED HIS COSTS FOR ITS INITIAL FAILURE TO PROVIDE AN RCW 42.56.210(3) COMPLIANT RESPONSE

The Department admits that it failed to cite and explain a statutory basis for its withholding of information with its initial response.

Respondent's Brief at 5. DOL does not dispute that this omission violates RCW 42.56.210(3), or that this violation required the award of costs to Mr. Gronquist under RCW 42.56.550(4).

The Department nevertheless requests this Court to affirm the trial court's refusal to award Mr. Gronquist costs, contending that "[a]ffirmance of the decision below would strike [a] 'fair middle ground' . . . ." Respondent's Brief at 16. DOL confines its argument to two points: (1) that it provided a letter citing several statutes to justify the redactions after this lawsuit was

filed; and (2) that a violation of RCW 42.56.210(3) does not authorize the award of per-day penalties. *Id.*, at 14-16. These arguments are irrelevant.

Mr. Gronquist is not requesting the award of independent penalties for the Department's violation of RCW 42.56.210(3). Rather, he is only requesting the award of costs. Amended Opening Brief at 20-24.

The Supreme Court has clearly held that an agency's failure to provide an RCW 42.56.210(3) compliant response at the time of its initial withholding violates the Public Records Act, and that "[s]ubsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time." Neighborhood Alliance v. City of Spokane, 172 Wn.2d 702, \_\_\_, 261 P.3d 119 (2011). The plaintiff "in such an instance is at least entitled to costs and reasonable attorney fees." *Id.* (citations omitted); see also Sanders v. State, 169 Wn.2d 827, 860, 240 P.3d 120 (2010) (failure to initially provide RCW 42.56.210(3) compliant response requires at least the award of costs).

Because the Department does not dispute that it violated RCW 42.56.210(3), this Court must reverse the trial court and remand this case for at least the award of costs.

IV. THE DEPARTMENT'S UNTIMELY RESPONSE TO MR. GRONQUIST'S PUBLIC RECORD REQUEST WAS RAISED IN THE TRIAL COURT AND UNCONTROVERTED EVIDENCE ESTABLISHES THAT THE DEPARTMENT FAILED TO RESPOND WITHIN FIVE BUSINESS DAYS

The Department claims that Mr. Gronquist failed to raise the issue of its untimely response to the public record request in the trial court, and that "uncontroverted evidence in the record is that Gronquist's letter arrived on the 31st of July, and was responded to timely on that date." Respondent's Brief at 16-17. These statements are absolutely baseless.

In two separate documents created by the same Assistant Attorney General of Washington who makes the above referenced statements, Counsel admits that the Department received Mr. Gronquist's public record request on July 21, 2009, and provided an initial response on July 31, 2009. CP 111 (stating these "facts are not in dispute."); and CP 123. Counsel's statements are based upon the sworn declaration of a senior DOL official, who averred:

On or about July 21, 2009, our office received a request for the business license application for Maureen's House Cleaning from Plaintiff Derek Gronquist.

We responded with the document within ten business days on July 31, 2009.

CP 115 ¶¶ 4 & 5 (emphasis added).

This evidence clearly establishes that the Department failed to respond within five business days in violation of RCW 42.56.520.

This issue was raised in the superior court, CP 134 & 139-140, despite the Department's earlier resistance to providing the date it received Mr. Gronquist's request. See CP 14 n.1, and CP 36.

Because the Department does not dispute that a violation of RCW 42.56.520 requires the award of costs and penalties to Mr. Gronquist, this Court must vacate the trial court's grant of summary judgment and remand this case back to the trial court to assess costs and penalties.

V. THE DEPARTMENT HAS FAILED TO MEET ITS BURDEN TO PROVE THAT A STATUTE AUTHORIZES THE WITHHOLDING OF EACH PIECE OF INFORMATION FROM THE MASTER LICENSE APPLICATION

A. The Department has Abandoned Its Claim of Exemption for a Majority of the Information Redacted from the Master License Application.

Upon appeal, the Department has only attempted to justify 7 of the 19 redactions made to the Master License Application for Maureen's House Cleaning. Respondent's Brief at 11-14. The information DOL claims as exempt is:

- \* The applicant's home address
- \* the applicant's home phone number
- \* The business' phone number
- \* Employee information
- \* Income information
- \* Banking information, and
- \* The applicant's marital status

Id.

The redactions DOL does not attempt to defend are:

- \* Whether the business is located inside city limits
- \* The business' e-mail address
- \* The applicant's date of birth
- \* The applicant's percent of business ownership
- \* The estimated gross income of the business (unless this information falls within DOL's definition of "income information")
- \* The type of activities conducted by the business
- \* The principle products or services provided by the business

- \* Whether the applicant bought, leased, or acquired all or part of an existing business, and
- \* Whether the applicant purchased or leased equipment without paying sales or use tax

Compare Id.; with CP 149-152.

Because the Department bears the burden of proving that each redaction made to the Master License Application is authorized by statute, RCW 42.56.550(1), its failure to even mention twelve of the redactions must be construed as a waiver of its previous claim of exemption, failure to meet its burden of proof, or both. As such, this Court must reverse the trial court, require disclosure of all undefended information, and remand this case to the superior court for the award of costs and penalties.

B. The Department may not Create its Own Exemptions to Disclosure of Public Records nor Rely upon Inapplicable Statutes of other Agencies.

The Department does not dispute the fact that no statute authorizes the withholding of information from a Master License Application. Compare Amended Opening Brief at 25-26, with Respondent's Brief at 10. Rather than concede that it unlawfully redacted information from the

Master License Application of Maureen's House Cleaning, DOL attempts to create a broad and all-encompassing exemption through false statements of fact, arguments unsupported by the record, and use of other agencies statutes to a record and information which have no application thereto.

The Department asserts that the Master License Application "collects information on behalf of various state and local agencies as part of the MLS." Respondent's Brief at 3. No citation to the record supports this claim. See *Id.* Moreover, DOL does not identify which "various state and local agencies" it is referring to. Nor is there evidence in the record indicating that DOL collected any of the information redacted from the Master License Application "on behalf of" the Departments of Revenue, Employment Security, or Labor and Industries.

Thereafter, DOL implies that it has created an exceptionally broad exemption prohibiting disclosure of almost every piece of information contained in a Master License Application:

The Department has Memorandums of Understanding (MOUs) in place with the Employment Security Department, the Department of Labor and Industries, and the Department of Revenue to protect confidential information. *Id.*

Consistent with the MOUs and pursuant to the statutes governing the agencies on whose behalf the information is collected, the Application contains information exempt from disclosure under the PRA.

Respondent's Brief at 4.

Even if we assume for the sake of argument that the information redacted from the Master License Application was gathered by DDL "on behalf of" the referenced agencies, the Department's Memorandum of Understanding (MOU) does not create a privacy entitlement for that information. Rather, the agreement is to "maintain the confidentiality" of information that was originally private, and which DDL "obtains from the other Parties". The MOU states:

Each party shall maintain the confidentiality of the data and information that it obtains from the other Parties:

- \* Data and information originated by one Party, which is confidential to that Party, shall maintain its confidential character when shared with any other Party.
- \* It shall be the responsibility of each Party receiving confidential data or information originating from another Party to preserve the confidentiality of that data or information. If such data or information becomes subject to subpoena or other legal process, the originating party shall be notified and afforded the opportunity to assist in the protection of its confidentiality.

CP 57 (emphasis added).

The Senior Administrator of DOL's Business and Professions Division has even admitted in an internal e-mail (supplied to Mr. Gronquist by the Department of Labor and Industries), that no statute exempts information contained in a Master License Application from public disclosure and that the MOU does not apply to information DOL collects for other agencies:

A reporter is insisting on receiving an unredacted copy of a Master Application from DOL and states we do not have authority to deny. . . .

The MLS law speaks to confidentiality in 19.02.030(2)(a) only in relation to computer systems data sharing and not sharing of "paper" information: "The duties of the center shall include: Developing and administering a computerized one-stop master license system capable of storing, retrieving and exchanging license information with due regard to privacy statutes. . . ."

The [MOU] that we talked about recently speaks only to each of us maintaining confidentiality for ". . . the data and information that it obtains from other Parties" (emphasis mine) but it doesn't talk about information DOL obtains for other parties.

CP 53 (first emphasis added).

Therefore, DOL knows it lacks statutory authority to redact information from a Master License Application and that its MOU does not

apply to information collected "on behalf of" other agencies -- but nevertheless misrepresents these facts to this Court.

Nor may the Department create its own exemptions to public disclosure through a multi-agency agreement. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 130-131 & 137, 580 P.2d 246 (1978) (agencies lack authority to define the scope of exemptions, and "an agency's promise of confidentiality or privacy is not adequate to establish the nondisclosability of information . . . ."); Police Guild v. Liquor Control Bd., 112 Wn.2d 30, 40, 769 P.2d 283 (1989) (agency pledge of confidentiality cannot exempt information: "The law of this state is well settled, "promises cannot override the requirements of the disclosure law."").

The Department has also failed to establish legal standing to assert other agencies statutes in this action, or to prohibit release of information in its possession. As an administrative agency, DOL has only those powers granted by the legislature. In re Myers, 105 Wn.2d 257, 714 P.2d 303, 306 (1986). No legislative delegation of authority vests DOL with the power to use other agencies statutes to

prohibit release of records or information in its possession. As such, DOL's reliance upon its MOU to enforce RCW 50.13.020, RCW 51.16.070, and RCW 82.32.330 is invalid as a matter of law.

Hearst Corp. & Police Guild, supra; RCW 34.05.570(2)(c) (requiring courts to invalidate agency rules passed in absence of legislative authority).

Such invalidity is particularly acute where DOL's MOU and assertion of other agencies statutes directly conflicts with a statutory mandate to release the information. See RCW 82.32.330(3)(1) (requiring public disclosure of tax returns and tax information possessed by agencies other than the Department of Revenue). The fact that neither the Employment Security Department, Department of Revenue, nor the Department of Labor and Industries has joined in this action (which would be consistent with DOL's MOU), speaks volumes toward the illegitimacy of DOL's claim that those agencies statutes prohibit release of information from the Master License Application for Maureen's House Cleaning.

Even if DOL possessed legal authority to use other agencies statutes to exempt information, its

conduct should be consistent with the other agencies interpretation and application of those statutes. For instance, the Department of Labor and Industries interprets RCW 51.16.070 to only apply to records obtained from the "employer's own files" which contain identifiers of employees who requested confidentiality. CP 63 & 66. Even from those records, it is the Department of Labor and Industries policy to disclose:

- \* The business owners home address
- \* The business owners home phone number
- \* The business' phone number
- \* The business' physical location
- \* The percent of business ownership, and
- \* The business' e-mail address

CP 61 & 208.

In addition, it is the policy of the Department of Revenue to disclose the business location (i.e., whether the business in inside city limits), and the Department of Licensing's policy to disclose the business phone number. CP 208; see also CP 29-32 (detailing DOL's intransigence regarding its refusal to disclose the business phone number contrary to its own policy). Thus, the Department's withholding

conflicts with the other agencies -- and even its own -- policies requiring the release of information redacted from the Master License Application.

C. RCW 51.16.070 does Not Exempt the Information.

For the first time on appeal, the Department contends that the applicant's home address, home phone number, business phone number, and employee information is exempt under RCW 51.16.070.

Respondent's Brief at 11-12. No evidence nor reasoned argument supports this contention. All DOL alleges is:

Consistent with the other agencies, the information collected by the LNI is strictly confidential. [RCW 51.16.070] provided a basis upon which the Department was authorized to redact the home address, home phone number and business phone number and employee information.

Respondent's Brief at 12.

There is absolutely no evidence establishing that the redacted information was "collected by" the Department of Labor and Industries. Rather, the information was provided to the DOL. RCW 51.16.070 only applies to information that the Department of Labor and Industries "obtained from employing unit records under the provisions of [] title [51] . . ."

The Department has failed to provide any evidence showing that the Department of Labor and Industries "obtained" the redacted information from an employing unit record under the provisions of Chapter 51 RCW. The Department has failed to prove that the Master License Application is an "employing unit record." Finally, and most significantly, the Department has failed to prove how RCW 51.16.070 can apply to information provided by a business with no employees -- sole proprietor's are specifically excluded from all provisions of RCW Chapter 51. RCW 51.12.020(5).  
D. RCW 42.56.410 and RCW 50.13.020 does Not Exempt the Information.

The Department has not even attempted to establish how the redacted information is exempt under RCW 42.56.410, or how RCW 50.13.020 applies independently of the Public Records Act. Cf. Amended Opening Brief at 33-34.

Nevertheless, DOL makes the general allegation that RCW 50.13.020 "requires that all information about an individual or employer remain confidential . . . ." Respondent's Brief at 11. DOL's argument overlooks one critical fact: it is not the Employment Security Department. RCW

50.13.020 only applies to information "obtained by the department of employment security pursuant to the administration of this title . . . ." DOL has offered no evidence establishing that the redacted information was "obtained by" the Department of Employment Security; and has therefore failed to meet its burden of proof.

The Department has also failed to prove that information provided by a sole proprietor was obtained "pursuant to the administration of" Title 50 RCW -- sole proprietor's are specifically excluded from all provisions of Chapter 50 RCW. RCW 50.04.145(3).

E. RCW 42.56.230(3) and RCW 82.32.330 does Not Exempt the Information.

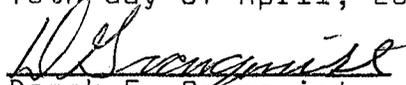
Contrary to the requirements of RCW 42.56.230(3), the Department has failed to prove that the redacted information was "required of any taxpayer in connection with the assessment or collection of any tax . . . ." See Respondent's Brief at 14. The record is actually converse: the information was voluntarily provided by a person wishing to license a business and register a trade name. CP 149-152. The statutes governing those activities contain no exemptions to public

disclosure. See RCW 19.02 and RCW 19.80.

The Department has also failed to prove that RCW 82.32.330 prohibits the release of the information. DOL has failed to rebut or distinguish Ford Motor Co. v. City of Seattle, 160 Wn.2d 32, 55-56, 156 P.3d 185 (2007), which held that Master License Applications have no connection to the assessment or collection of taxes. The Department has failed to prove how information like the business' telephone number or the applicant's marital status falls within a narrow interpretation of RCW 82.32.330(1)(e).

Finally, the Department has not explained how it can withhold information in the face of RCW 82.32.330(3)(1)'s clear mandate to disclose taxpayer information in response to a public records request.

Submitted this 16th day of April, 2012.

  
Derek E. Gronquist  
#943857 C-404-L  
Monroe Correctional Complex  
P.O. Box 888/TRU  
Monroe, WA 98272

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day I deposited a properly addressed envelope in the internal mail system of the Monroe Correctional Complex, and made arrangements for postage, containing: Reply Brief. Said envelope(s) was address was addressed to:

Susan L. Pierini  
Assistant Attorney General  
P.O. Box 40110  
Olympia, WA 98504; and

David C. Ponzoha, Clerk  
Washington State Court of Appeals  
950 Broadway, Ste. 300  
Tacoma, WA 98402-4454

Dated this 18<sup>th</sup> day of April, 2011.

  
Derek E. Gronquist  
#943857 C-404-L  
Monroe Correctional Complex  
P.O. Box 888/TRU  
Monroe, WA 98272

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