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DIVISION II

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STATE OF WASHINGTON

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No. 48925-2-II

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SHAPPA BAKER

Appellant

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Shappa Baker had requested the front and back of 31 negotiable instruments deposited into his inmate accounts. The Department of Corrections (Department) made electronic deposits after scanning various money orders sent to Baker. These scans are available on the Bank of America's system and are readily available to the Department. The Department refused to obtain the responsive documents because they were in the possession of a third party. Baker submits this violated the Public Records Act (PRA).

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its order denying Baker's Motion for Summary judgment and granting summary judgment on behalf of the Department of Corrections on March 25, 2016.

2. The trial court erred in entering its order denying Baker's Motion for Reconsideration on April 15, 2015.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it failed to find that because the Department prepared and used the scanned financial instruments they were public records?

2. Did the trial court err when it failed to apply a use test set forth in *Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999) to the documents requested?

3. Did the trial court err in granting statutory attorney fees to the Department?

III. STATEMENT OF THE CASE

A. THE PUBLIC RECORDS ACT REQUEST

Baker sent Gaylene Schave, a Public Disclosure Specialist in the Department's Public Disclosure Unit (PDU) a request dated April 26, 2015. CP 72. In this request, he asked for the front and back of thirty-one negotiable financial instruments sent in his name and deposited into his trust sub-accounts. It was received by the PDU April 30, 2015. CP 73-74. In this five-day letter dated May 4, 2015, Schave acknowledged receipt of Baker's request and assigned it tracking number PDU-34168. *Id.* She then assigned the task of obtaining the records to Cherrie Borgen. CP 75-77.

In a letter dated May 20, 2015, Baker informed Schave that there were two typographical errors in the Department's acknowledgment letter of May 4, 2015. CP 78. Schave responded by letter dated June 1, 2015 and acknowledged receipt of Baker's clarification letter. CP 79-80.

Meanwhile, Ben Estock at Coyote Ridge Corrections Center (CRCC) responded to Baker's forwarded request by asking the Bank of America for

copies. CP 67-68. (Baker had transferred to the Washington State Penitentiary (WSP) on October 28, 2008, returning to CRCC on August 11, 2009. CP 81-82). Estock responded to Borgen by email on May 21, 2015, attaching the faxed copies the bank had sent - front and back sides of two money orders deposited August 6, 2009. CP 66-67. Baker did not receive these documents until the Department responded to his second set of production requests on December 30, 2015. CP 128-33.

In an email dated June 1, 2015, Schave communicated Baker's clarification to Cherrie Borgen and asked her to "indicate if the back of each negotiable instrument with endorsements are copied" and to inform her if the Department did "not have the back of these items to copy." CP 83. Borgen responded on June 3, 2015, apparently under the belief that she had completed her task, stating that she spent one hour and 15 minutes responding to the request. CP 84. She ostensibly sent all the records she received to Schave on June 3rd. CP 66. The request was not completed because eight days later, Theresa Pernula instructed Schave that she should look for records at WSP. *Id.* Schave replied, saying Borgen was supposed to get records from the facilities. CP 85.

The Department's automated public disclosure management system (DOCPD) deemed a second search necessary to respond to Baker's request. CP 86. It stated the task assigned to Schave on June 24, 2015 was overdue.

Id. A new due date was assigned. Borgen confirmed to Schave that Barerra had requested the records for the money orders deposited August 6, 2009. CP 87. It was noted that two pages of these documents had been received.¹ According to the Department, Patricia Barerra was going to try to get the records Estock had already received. CP 68. On the overdue notifications from DOCPD Schave received, it stated that Borgen had sent Schave responsive records on July 19, 2015. This communication did not contain the faxed documents provided by Estock. CP 88.

Schave informed Baker by letter dated July 28, 2015 that she had gathered 30 pages of responsive records and instructed him to send payment for copies and postage if he wanted to inspect the records. CP 89-90. Schave received as a “cc” another overdue notification from DOCPD on August 3, 2015, several days after the response was sent, showing there were administrative problems. CP 91-92. Baker sent his payment, and Schave acknowledged receiving it in her August 25, 2015 letter. CP 93. Schave informed Baker that the Department had sent a CD containing the records to a third party Baker had designated and that his request was thereby considered fulfilled and closed. The CD included an exemption log dated July

¹ This is confusing because there were actually four pages received if one counts front and back separately as it was set forth in the request and as Estock received them. However, they were never provided.

27, 2015, indicating that computer security and IPIN numbers had been redacted from pages 11 and 15 of PDU-34168 and that bank account numbers had been redacted from pages 25 and 26. CP 94.

Of the 31 records Baker requested, both front and back, only 19 were provided completely. CP 95-124. See Appendix A.² For seven of the money orders (hereafter referred to as “checks”) included in his request, copies of the front and back were both omitted (items a, b, f, g, j, r, and z). For another six checks, Baker received copies of only one side of the record (items c, s, t, aa, and dd). Other records of the gratuities were electronic in nature and, having no “front or back,” were provided as a printed ledger. In all, Baker was not provided six records of the front and eleven records of the back of his requested former financial instruments. *Id.*

B. THE DEPARTMENT’S PROCESS FOR DEPOSITING CHECKS INTO ITS BANK OF AMERICA ACCOUNTS.

The Department handles a great deal of money on behalf of not only itself but the inmates in its custody. Money earned and received by inmates during their incarceration is managed through a system of bank accounts, trust accounts, remote banking hardware, and accounting software. Using this system, the Department holds funds on behalf of inmates and deducts a

² The Appendix was developed to assist the trial court track the records requested. It is attached for the Court’s convenience.

portion of those funds as required to meet inmates' financial obligations both to the Department and other entities.

The Department's financial management system is organized, at the highest level, into a series of "caseloads." CP 135. Some caseloads are comprised of multiple correctional facilities, but most include only one. CP 136. Each caseload maintains a separate bank account with Bank of America. *Id.* While all inmate funds are held together in a caseload's bank account, each facility maintains separate inmate accounts within a Trust Accounting System (TAS) to manage and track the deposits made on behalf of inmates. CP 136, 147, 156. Within the TAS, each inmate has seven different sub-accounts, consisting of postage, spendable, savings, work training release savings, education, medical, and community-service-revolving-fund accounts. CP 135-36, 163-67.

Depending on the source of funds and type of deposit, money received or earned by inmates may be subject to statutory deductions. CP 136, 157, 168-69, 170-72 (citing RCW 72.09.111, 72.09.450, 72.09.480, and 28 U.S.C. § 1915 with priorities set by RCW 72.11.030). To this end, TAS administrators create deductions for the different subaccounts when funds are deposited so that when a deposit is made, the appropriate amount is deducted automatically. CP 138. These deductions are the disbursed on a monthly basis

to other governmental entities to pay inmates' legal financial obligations, costs of supervision, and contributions to the crime victims' fund. *Id.*

Checks received by inmates are deposited on their behalf by facility staff. CP 136. These funds are deposited into the caseload's Bank of America account using a remote deposit machine and Bank of America's CashPro software. CP 137, 139. The Department began using the CashPro software in 2011. CP 150. To prepare checks for deposit, facility staff endorses the back side of the check with a deposit stamp, fills out a deposit slip, and then scans both sides of the check using the remote deposit machine. CP 149. The scans are digitally stored in the CashPro system for future access. CP 139. The stored images are used to verify whether funds were deposited into the correct TAS subaccount or whether a deposit was correctly posted. CP 150. After the check has been scanned for deposit, the deposit amounts appearing on the website are manually verified to ensure that the deposit amount the software interpreted from the scan matches the amount actually designated on the check. CP 151. Next, the check is bundled together with the deposit slip and a printed report of the deposit for filing. *Id.* Once the funds have been deposited into the caseload's bank account, a corresponding deposit is manually posted to the inmate's TAS account or sub-accounts. CP 148. Once this process is complete, the Department holds the deposited checks for 90 days in a filing cabinet before they are destroyed. CP 149.

If, for any reason, the Department requires access to scanned images of the fronts and backs of deposited checks, it has two means of obtaining them. Using the CashPro software, Department staff may access images of both sides of deposited checks and corresponding deposit slips going back seven years. CP 139, 149-50. These may be searched and retrieved using parameters including date range and reference number. CP 139. Alternatively, the Department may request the images by calling its “dedicated service advisor” at Bank of America. CP 141. Bank of America makes scanned images of deposited checks through its online banking part of the CashPro system. CP 150. Such documents are available to its customers for seven years after they are deposited. CP 175, 179.

On the day the Department received Baker’s records request (April 30, 2015), it had access to images of deposits dating back to April 30, 2008. Baker’s request asked for front and back images of nine money orders, the oldest deposited on November 8, 2008. CP 72-73. Nevertheless, despite its ready access to images of the front and back sides of the deposited money orders Baker requested, the Department did not try to retrieve them the using either method.

C. PROCEDURAL POSTURE

On February 16, 2016, Baker filed a motion for summary judgment. After the Department responded and Baker replied, the trial court granted

summary judgment for the Department. CP 219-20. Baker then filed a timely motion for reconsideration. After the Department responded and Baker replied, it which was subsequently denied. CP 248-49. A timely notice of appeal was filed challenging both rulings. CP 250-57.

IV. SUMMARY OF THE ARGUMENT

Baker will first show that the scanned copies of financial instruments are public records. He will then show that the Department withheld these documents and violated the Public Records Act. Finally, Baker asks he be awarded reasonable attorney fees and costs on appeal.

V. ARGUMENT

A. STANDARD OF REVIEW

Appellate courts review agency actions under the Public Records Act de novo. RCW 42.56.550(3). This Court “stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence.” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) (*PAWS*). Therefore, it is not bound by the trial court’s factual findings on whether or not an agency violated the PRA.

Granting summary judgment is appropriate when the pleadings, affidavits, interrogatories, depositions and exhibits show there are no genuine issues of material fact. The moving party is then entitled to judgment on the

issues presented as a matter of law. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994). When reasonable minds could reach but one conclusion regarding the claims of disputed facts, such questions may be determined as a matter of law. *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 740, 937 P.2d 1074 (1999). Any doubt as to the existence of genuine issue of material fact will be resolved against the movant. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact is a fact upon which the outcome of case depends, in whole or in part. *Clements v. Travelers Indem. Co.*, 121 Wn.2d. 243, 249, 850 P.2d 1298 (1993) (citation omitted). When a trial court makes a evidentiary determination on summary judgment the appellate court conducts the same inquiry as the trial court. *Folsom v. Burger King*, 135 Wn .2d 658, 663, 958 P.2d 301 (1998).

The standard of review for a motion for reconsideration depends on whether or not it challenges an issue of fact or law. Motions challenging rulings based on evidence are reviewed for an abuse of discretion. *Allyn v. Boe*, 87 Wn. App. 722, 729, 943 P.2d 364 (1997) (citing *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 561, 815 P.2d 798 (1991)). However challenges to an order based upon legal rulings have no element of discretion present. *Id.* (citing *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1989)).

B. JUDICIAL REVIEW OF AN AGENCY'S RESPONSE TO A PUBLIC RECORDS ACT REQUEST IS REVIEWED WITH ALL INFERENCES TO BE CONSTRUED IN FAVOR OF THE PARTY SEEKING THE RECORDS.

“The purpose of the PRA is to preserve ‘the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.’” *O'Connor v. Dept. of Soc. & Health Servs.*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001) (quoting *PAWS*, 125 Wn.2d at 251).

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

RCW 42.56.030.

It is “a strongly worded mandate for broad disclosure of public records.” *Prison Legal News, Inc. v. Dept. of Corr.*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005). The PRA provides that “[j]udicial review of all agency actions taken or challenged under [now RCW 42.56.030 through 42.56.520] shall be de novo.” *O'Connor*, 143 Wn.2d at 904 (quoting *PAWS*, 125 Wn.2d at 252; RCW 42.56.550(3)).

The Supreme Court in *PAWS* emphasized that “[a]gencies have a duty to provide ‘the fullest assistance to inquirers and the timeliest possible action

on requests for information.” *PAWS*, 125 Wn.2d at 252 (quoting now RCW 42.56.100)). It is abundantly clear that “[l]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978).

Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550(1); *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 426 (1990); RCW 42.56.550(3). Finally, an agency “shall not distinguish among” requesters. RCW 42.56.080.

C. IMAGES OF THE CHECKS DEPOSITED INTO THE BANK OF AMERICA REMOTE DEPOSIT SYSTEM ARE PUBLIC RECORDS.

In determining whether the PRA applies, courts must determine the threshold matter of whether the record sought constitutes a public record. See *Dragonslayer, Inc. v. Wash. State Gambling Cmm'n.*, 139 Wn. App. 433, 444, 161 P.3d 428 (2007). In order for something to be considered a public record, it must be (1) a writing (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function and (3) be prepared, owned, used or retained by any state or local agency. RCW 42.56.010(3); *Dragonslayer*, 139 Wn. App. at 444. A

record must meet all three elements to be considered a public record.

Dragonslayer, 139 Wn. App., at 444.

1. The Money Orders and Scanned Images of Them Are Writings.

The Public Records Act defines “writing as:

...handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.010(4). “When interpreting a statute, courts first look to its plain language.” *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

If the plain language is subject to only one interpretation, the court’s inquiry ends because plain language does not require construction. *Id.*; *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). The plain language interpretation of RCW 42.56.010(4) requires a financial instrument to be defined as a writing.

RCW 42.56.010(4) provides an extensive list of what constitutes a writing. It includes

handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited

to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.010(4). A communication is defined as “[t]he interchange of messages or ideas by speech, writing, gestures or conduct.” Black’s Law Dictionary 244 (10th ed. 2015). Financial instruments are a printed form of communication that effect a transfer of funds from one individual or entity to another. An electronic scan is one “means of recording” that communication. RCW 42.56.010(4). Therefore, checks are writings and the first element of *Dragonslayer* is met.

2. The Requested Records Contain Information Relating To The Performance Of A Governmental Function.

The second element of the definition of “public record” in RCW 42.56.010(3) requires that information contained in the record must “[relate] to the conduct of government or the performance of any governmental or proprietary function ...” RCW 42.56.010(3). Baker establishes this element by showing that (1) management of inmate trust accounts and deducting funds from money orders received by inmates are functions of government, and (2) the scanned images of the money orders Baker requested relate to the performance of a that governmental function.

The term “governmental function” is not defined in Ch. 42.56 RCW. Black’s Law Dictionary defines a “governmental function” as any agency’s “conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public.” Black’s Law Dictionary at 589. In establishing the Department of Corrections, the legislature provided for a “system of corrections for convicted law violators ... designed ... to provide the maximum feasible safety for the persons and property of the general public.” RCW 72.09.010(1). Among the powers and duties the legislature assigned the secretary of the Department is the authority to adopt standards for the operation adult correctional facilities” that are “within appropriation levels authorized by the legislature.” RCW 72.09.050; RCW 72.09.135. The legislature also mandated that, when an inmate receives funds “in addition to his or her wages or gratuities,” the Department must deduct money from those funds to be paid into a series of government accounts. 72.09.480; *see also* RCW 72.09.110; 72.09.111. The Department promulgated policies to make these deductions. CP 157, 163-72(citing RCW 72.09.111, 72.09.450, 72.09.480, and 28 U.S.C. 1915). Hence, the Department performed a “governmental function” within the meaning of RCW 42.56.010(3) when it deducted funds from the money orders Baker received in prison.

The language in RCW 42.56.010(3) “relate to the ... performance of any governmental or proprietary function,” has been interpreted broadly. *See Nissen v. Pierce County*, 183 Wn.2d 863, 880, 357 P.3d 45 (2015) (citing *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 739-43, 958 P.2d 260 (1998), *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 566, 618 P.2d 76 (1980)). The Supreme Court examined the factual basis of the rulings in *Confederated Tribes* and *Oliver* and then stated “these cases suggest records can qualify as public records if they contain any information that refers to or impacts the actions, processes, and functions of government.” *Id.* at 880-81.

The scanned images plainly relate to the governmental function that RCW 72.09.110, 72.09.111(1) and 72.09.480(2) requires the Department perform: deducting money from inmate receipts. However, *Nissen* provides additional support for this proposition because, in that case, the Supreme Court concluded that records relate to the performance of a governmental function when they “contain any information that refers to...the actions, processes, and functions of government.” 183 Wn.2d. at 880-81. Here, the image of the Department’s endorsement stamp on the back-side scan of the money order refers to the process by which the Department deposits and deducts fund from the inmate’s money order pursuant to RCW 72.09.480(2). The information on the back of the financial instrument is used both by the

Department and the Bank. Therefore, because the scanned images of inmates' money orders contain information that refers to the deposit and subsequent deduction and use of these funds, the records relate to a function of government.

The second *Dragonslayer* element is met because the records relate to the performance of a governmental function. This has been shown by establishing above that taking deductions from inmates' money orders is a function of government, and that scans of those money orders relate to that function.

3. The Department Used Baker's Money Orders and Prepared the Scanned Images of them.

The PRA defines a public record as a writing that relates to the performance of a governmental function, "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). Thus, a writing that relates to the performance of a governmental function will meet this definition if it is either used or prepared by an agency. Here, Baker's money orders were used by the Department in making its statutorily-mandated deductions, and the scanned images of both sides of those money orders were prepared by the Department.

Consistent with the plain meaning of the word "used" as found in RCW 42.56.010(3), the Department "used" Baker's money orders in its

performance of a governmental function. (See discussion of statutory interpretation *supra*.) Black's Law Dictionary provides a definition of "use" as "[t]o employ for the accomplishment of a purpose." Black's Law Dictionary at 1312. Here, the end or process served was the deduction of funds from Baker's money orders pursuant to statute. To achieve this goal, the scanning of all financial instruments sent to Baker's inmate account was an absolute requirement.

In *Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1 of Clark County*, the Supreme Court adopted a definition of the term "used" consistent with both Black's Law Dictionary and the PRA's purpose of broad disclosure: "an agency... 'used' the information within the meaning of the Act if the information was...made instrumental to a governmental end or purpose." 138 Wn.2d 950, 960, 983 P.2d 635 (1999). The Supreme Court held that, "regardless of whether an agency ever possessed the requested information, an agency may have 'used' the information within the meaning of the Act if the information was either: (1) employed for; (2) applied to; or (3) made instrumental to a governmental end or purpose." *Id.* In *Concerned Ratepayers*, a private third party had the only available copy of a technical drawing of a turbine that the Public Utility District (PDU) neither prepared, owned, nor retained. *Id.*, at 954. What was critical to the determination that the drawing was a public record was that most, if not all, of the technical

specifications of the IPS 10380 turbine generator had been viewed and evaluated by engineers from the PUD at the vendor Cogentrix's offices in North Carolina. *Id.*, at 956. The Supreme Court, notwithstanding the independent, non-governmental status of Cogentrix, held that the drawing was a responsive public record and remanded the case to determine whether the PRA's exemption for proprietary information applied. *Id.*, at 962 (citing now RCW 42.56.270(1)). The same reasoning governing what is a responsive record applies here.

Here, the Department used, no matter how briefly, the original financial instruments sent to Mr. Baker from outside sources. It prepared the scanned images and subsequently destroyed the originals pursuant to a retention schedule. The Department relies on access to these images for resolving accounting errors and reconciling accounts. Each financial instrument Mr. Baker receives is subject to statutory deductions, and Mr. Baker has a vested personal interest in obtaining information relating to deductions and trust account deposits made in his name. In this matter, Mr. Baker has established that the Department both "prepared" and "used" the records he sought.

The Department will claim that because the Bank has possession of the records sought by Mr. Baker, they are not public records because they

were not used. But as *Concerned Ratepayers* establishes, third party possession is not the determining factor to establish use.

The Department will also try to argue using the functional equivalent test of *Telford* that because the Bank of America is not the functional equivalent of a governmental agency, the records are not disclosable. See *Telford v. Thurston County Bd. of Com'rs*, 95 Wn. App. 149, 156, 974 P.2d 886 (1999). This argument is not applicable because the issue is not whether or not a third party agency might be the functional equivalent of an agency but whether or not an agency used documents from a third party. These are two separate issues.

The Department also uses stored electronic images of checks when correcting accounting errors or reconciling accounts. CP 138. When Department staff encounters a possible accounting error and need to review a deposited check to, for example, determine whether or not it was posted to the correct sub-account in the TAS, it accesses the stored electronic image of the check to correct any potential error. *Id.* It also uses these stored images for account reconciliation processes. *Id.*

The Supreme Court adopted a definition of “prepared” as used in RCW 42.56.010(3): “to put together; to make, produce; to put into written form.” *Nissen*, 183 Wn.2d at 881 (internal quotations omitted) (quoting Webster’s Third New International Dictionary, 1790 (2002)). This

interpretation, the Court held, is consistent with previous cases that treat “preparing” a record as creating it.” *Id.* In the matter before this Court, it may be un-controversially stated that the Department made the electronic images of Baker’s money orders. CP 139. The fact the equipment was supplied by an outside provider is simply irrelevant. Therefore, the scans of the used financial instruments were “prepared” by the Department within the meaning of that term in RCW 42.56.010(3).

The third *Dragonslayer* element is met because the records Baker requested were used and prepared by the Department. This has been shown by establishing above that the money orders were instrumental to a governmental purpose, and that the scanned images of the money orders were made and/or produced by the Department. Therefore, under the three-part test set forth in *Dragonslayer*, the copies and scanned images of Baker’s used financial instruments are public records.

D. THE DEPARTMENT VIOLATED THE PUBLIC RECORDS ACT BY NOT PROVIDING BAKER COPIES OF ALL HIS REQUESTED DEPOSITED FINANCIAL INSTRUMENTS.

The Department had three options available to it when Baker submitted his public records request for copies of both sides of his money orders. It could have (1) provided the records, (2) informed Baker that it needed more time to fulfill his request, or (3) denied his request. See RCW

42.56.520. The Department put its head in the sand and refused to ask for the records, denying his request.

Baker has established the copies of the checks he requested in his public records request were public records. *See* section C, *supra*. The Department neither provided all the requested records nor an explanation as to why they were not provided on the exemption log. CP 94. Failing to produce all or part of a requested record without providing an exemption and an explanation as to how that exemption applies is “silent withholding,” which the PRA prohibits. *Rental Housing v. Des Moines*, 165 Wn.2d 525, 537, 199 P.3d 393 (2009) (quoting *PAWS*, 125 Wn.2d at 247). Therefore, the Department is liable for violating the PRA because it silently withheld some of the scanned images Baker requested in his public records request. This violation includes not providing the two copies of the two money orders it received from Bank of America via fax but failed to offer to provide a copy to Baker.

The Department also violated the PRA when it knew that the records Baker requested were available but failed to obtain them. In *Cedar Grove Composting, Inc. v. City of Marysville*, the Supreme Court held that the agency violated the PRA when it knew of the existence of public records in the possession of a private third party and failed to disclose them when they were requested. 188 Wn. App. 695, 723, 354 P.3d 249 (2015).

In *Cedar Grove*, a third party was sending out mailers to residents in the Marysville area about who to contact if they wished to wage a complaint against Cedar Grove. *Id.* at 703. Division I upheld the trial court's determination that the actions were usually done by an agency, making it liable. *Id.* at 722. While the holding applied the functional analysis test of *Telford*, the *Cedar Grove* Court also upheld the ruling applying the holding of *Concerned Ratepayers*. *Id.* at 721. In rejecting the same type of argument the Department has and will make that it never had possession of the documents, the *Cedar Grove* Court stated that "the court in *Concerned Ratepayers* concluded that the agency did not have to possess a document to 'use' it for purposes of the PRA, agreeing with the Court of Appeals that "possession of information is not determinative of the issue." *Id.* at 722 (quoting *Concerned Ratepayers*, 138 Wn.2d at 959-60). This was because the actions taken by the third party "clearly furthered the interests of Marysville." *Id.* This was sufficient to establish the necessary use.

In this case, the actions of the Department in scanning the financial instruments so it could then deduct monies "clearly furthered the interests" of the Department. The Department had two means at its disposal with which to retrieve these scanned images yet it failed to retrieve them – violating the PRA by silently withholding them. Therefore, the Department is liable under

the Public Records Act for failing to disclose the scanned images of the money orders Baker requested.

E. BAKER IS ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS.

If this Court finds the Department in violation of the PRA when it responded to Baker's request, Baker asks that the fees previously awarded the Department be denied and he be granted reasonable attorneys fees and costs. An individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). Baker first asks that reasonable attorney fees and costs for the appeal be granted. RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. RCW 42.56.550(4) grants this right. Baker also asks this Court order the trial court to grant reasonable attorney fees and costs on remand.

VI. CONCLUSION

For the reasons stated above, Baker asks this Court to find that the Department violated the Public Records Act and remand the case back to the trial court for a determination of possible penalties. He also asks that on remand the trial court determine reasonable attorney fees and costs. Baker finally asks this Court to award reasonable attorney fees and costs on appeal.

Respectfully submitted this 22nd day of July, 2016.

KAHRS LAW FIRM, P.S.


MICHAEL C. KAHRS, WSBA #27085
Attorney for Appellant Baker

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COURT OF APPEALS
DIVISION II
2016 JUL 25 AM 11:39
STATE OF WASHINGTON
BY _____ DEPUTY

VII. CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on July 22, 2016, in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S OPENING BRIEF

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By: 
MICHAEL C. KAHRIS

Date: 7/22/16

APPENDIX A

VII. APPENDIX A

**RESPONSE OF THE DEPARTMENT TO
BAKER'S REQUEST FOR FINANCIAL INSTRUMENTS**

	<u>Date</u>	<u>Description</u>	<u>Facility</u>	<u>Front</u>	<u>Back</u>
a.	11/06/2008	Money Order	Penitentiary	No	No
b.	11/06/2008	Money Order	Penitentiary	No	No
c.	11/16/2008	Western Union	Penitentiary	No	N/A
d.	12/08/2008	Western Union	Penitentiary	Yes	N/A
e.	12/15/2008	Gratuity	Penitentiary	N/A	N/A
f.	01/16/2009	Money Order	Penitentiary	No	No
g.	02/4/2009	Money Order	Penitentiary	No	No
h.	02/13/2009	Gratuity	Penitentiary	N/A	N/A
i.	02/13/2009	Gratuity	Penitentiary	N/A	N/A
j.	03/17/2009	Money Order	Penitentiary	No	No
k.	04/15/2009	Gratuity	Penitentiary	N/A	N/A
l.	05/15/2009	Gratuity	Penitentiary	N/A	N/A
m.	06/03/2009	Western Union	Penitentiary	Yes	N/A
n.	06/15/2009	Gratuity	Penitentiary	N/A	N/A
o.	06/17/2009	Western Union	Penitentiary	Yes	N/A
p.	07/15/2009	Gratuity	Penitentiary	N/A	N/A
q.	07/15/2009	Gratuity	Penitentiary	N/A	N/A
r.	07/23/2009	Money Order	Penitentiary	No	No

s.	08/06/2009	Money Order	Coyote Ridge	Yes	12/30/2015*
t.	08/06/2009	Money Order	Coyote Ridge	Yes	12/30/2015*
u.	08/18/2009	Gratuity	Airway Heights	N/A	N/A
v.	10/05/2009	Western Union	Airway Heights	Yes	N/A
w.	11/02/2009	Western Union	Airway Heights	Yes	N/A
z.	01/20/2011	Refund ⁺	Airway Heights	No	No
aa.	04/04/2011	Money Order	Airway Heights	Yes	No
bb.	04/07/2011	Western Union	Airway Heights	Yes	N/A
cc.	03/07/2013	JPay	Airway Heights	Yes	N/A
dd.	03/07/2013	Warrant	Headquarters	Yes	No
ee.	09/16/2013	Gratuity	Airway Heights	Yes	N/A

* Received during discovery after the lawsuit was filed.