

**FILED**

**JUL 15 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 289664

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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FRANKLIN R. SIMPSON

Appellant,

vs.

OKANOGAN COUNTY AND OKANOGAN COUNTY PROSECUTING ATTORNEY  
KARL F. SLOAN

Respondent.

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BRIEF OF APPELLANT FRANKLIN R. SIMPSON

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AIRWAY HEIGHTS CORR. CNTR  
PO BOX 2049 MA 61L  
AIRWAY HEIGHTS, WA 99001

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## TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENT OF ERROR	2
	A. First Assignment of Error: Compliance with the Process Required by the Public Records Act	2
	B. Second Assignment of Error: Reliance on the Exemptions to the Public Records Act	2
	C. Third Assignment of Error: Denial of Request for Okanogan County Prosecuting Attorney's Personnel File and Insurance	2
	D. Fourth Assignment of Error: Failure to Grant Motion for Continuance to Conduct Pretrial Discovery	2
	E. Issues Pertaining to Assignments of Error	3
III.	STATEMENT OF CASE	3
	A. Factual Background	3
	1. Simpson's Public Records Requests are as Follows	3
	2. Simpson's September 17, 2008 Request Letter	4
	3. The County's Release of Records Responsive to Group One of Simpson's Request	7
	B. Procedural History	8
IV.	ARGUMENT	9
	A. The Trial Court Improperly Allowed the County to Disregard the Public Records Act's Requirement in Responding to Simpson's Requests for Public Records	10
	B. RCW 70.02.020 Applies Only to the Extent the Record Identifies or Can BE Readily Associated with the Identity of a Patient	13
	C. The Trial Court Improperly Allowed the County to Disregard Simpson's Requests For Okanogan County Prosecuting Attorney's Personnel File and Bond	14
	D. The Trial Court Improperly Denied Simpson's Motion for Continuance of Summary Judgement	16

E. Okanogan Should Ensure Its Employees are Adequately Trained to Recognize and Process Public Records Requests	16
F. This Court Should Recognize Simpson as the Prevailing Party For Purposes of the Statutory Penalty and Award of Attorney's Fees	18
V. CONCLUSION	20

**TABLE OF AUTHORITIES**

ACLU of Washington v. Blaine School District No. 533  
95 Wn.App 106, 11, 975 P.2d 536(1999).....19,20

Ames v. City of Fircrest  
71 Wn.App 264, 291, 857 P.2d 1083 (1993).....15

Amren v. City of Kalama  
131 Wn.2d 25, 29, 36037, 929 P.2d 389(1997).....19,20

Citizens for Fair Share v. State Department of Corrections  
117 Wn.App 411, 431, 72 P.3d 206(2003) review denied.....12

Coalition on Government Spying v. King County Dep't of Public Safety  
59 Wn.App 856, 864, 801 P.2d 1009(1990).....18

Dawson v. Daily  
120 Wn.2d 782, 789, 845 P.2d 995(1993).....15

DOE I v. Washington State Patrol  
80 Wn.App 296, 303, 908 P.2d 914(1996).....18,19

Hearst Corp. v. Hoppe  
90 Wn.2d 123, 127, 580 P.2d 246(1978).....10,19

Jeckle v. Attorney General's Office  
128 Wn.App 1015, No. 22730-8-III, 2005 WL1502047(2005).....14

Linstrom v. Ladenburg  
85 Wn.App 524, 534, 933 P.2d 1055(1997).....18

Linstrom v. Ladenburg  
136 Wn.2d 595, 617, 963 P.2d 869(1998).....19,20

Lindberg v. County of Kitsap  
133 Wn.2d 729, 746, 948 P.2d (1997).....18

Lybbert v. Grant County  
141 Wn.2d 29, 34, 1P.3d 1124(2000).....9

Miller v. United States Department of State  
779 F.2d 1378, 1389(8th Cir. 1985).....18

Newman v. King County  
133 Wn.2d 565, 570, 947 P.2d 712(1997).....15

O'Connor v. WASHINGTON State Dep't of Social and Health Services  
143 Wn.2d 895, 25 P.3d 426(2001).....1

Oliver v. Harborview Medical Center  
94 Wn.2d 559, 566 P.2d 76(1980).....14,16

Owen v. Burlington N. Santa Fe R.R.  
153 Wn.2d 780, 789, 108 P.3d 1220(2005).....9

Progressive Animal Welfare Society v. University of Washington  
114 Wn.2d 677, 583, 790 P.2d 604(1990).....13,18,19

Progressive Animal Welfare Society v. University of Washington  
125 Wn.2d 243, 884 P.2d 592(1994).....1,10,11,12

Sherman v. State  
128 Wn.2d 164, 184, 905 P.2d 355(1995).....9

Smith v. Okanogan County  
100 Wn.App 7, 11, 994 P.2d 857(2000).....10

Tacoma News, Inc v. Tacoma-Pierce County Health Department  
55 Wn.App 515, 525, 778 P.2d 1066(1989).....18

Vance v. Offices of Thurston County Commissioners  
177 Wn.App 660, 668, 71 P.3d 680(2003).....15

Yacobellis v. City of Bellingham  
64 Wn.App 295, 103, 825 P.2d 324(1992).....20

**STATUTES**

RAP 18.1.....18

RCW 26.15.050.....5

RCW 36.16.136.....5

RCW 42.17.....9

RCW 42.17.251 (1992).....10

RCW 42.17.312 (1992).....6

RCW 42.17.340 (1992).....10

RCW 42.56.....4,9

RCW 42.56.010(1).....15,16

RCW 42.56.040(1).....17

RCW 42.56.070.....2

RCW 42.56.080.....11

RCW 42.56.100.....10

RCW 42.56.210(1).....10

RCW 42.56.210(3)	10,11,12
RCW 42.56.360	3,9,20
RCW 42.56.360(2)	2,13,20
RCW 42.56.520	2,10,11
RCW 42.56.550	13,18
RCW 42.56.550(4)	18,19,20
RCW 42.56.580(1)	16
RCW 70.02.010(6)	13
RCW 70.02.020	6,9,13,14,20

**WAC RULES**

WAC 44.14.02002	16
WAC 44.14.00005	17

## INTRODUCTION

This case concerns public records requests by Franklin R. Simpson (Simpson) a inmate at Airway Heights Correction Center (AHCC). The requests seek public records regarding the public trial of Simpson. Also records concerning the performance of the official duties of Okanogan County Prosecutor Karl F. Sloan (Sloan). This case involves Washington's Public Records Act (PRA), which exists to "preserve 'the most central tenets of representative governments, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.'" *O'Connor v. Washington State Dep't of Social and Health Servs.*, 143 Wn.2d 895, 905, 25 P.3d 426(2001)(quoting *Progressive Animal Welfare Soc'y v. University of Washington* 125 Wn.2d 243, 252, 884 P.2d 592(1994)(PAWS'').

The appellant seeks to overturn a Ferry County Superior Court order denying Simpson copies of public records from Okanogan County (the County). In its order, the Superior Court held that the County correctly relied on exemptions to the PRA when withholding records, including investigative records as well as medical records.

In this appeal, this Court can remind public agencies that the public's right to know is an essential right, regardless of which members of the public request public records. This case also affords this Court the opportunity to define the scope of oft-cited exemptions to the PRA to ensure agencies do not skirt their public duty by refusing to produce documents the Washington Legislature clearly expected and intended would be fully disclosed under the PRA. In doing so, this Court can reaffirm a message that the exemptions to disclose are limited and narrowly defined by the plain language of the statute.

## II. ASSIGNMENTS OF ERROR

The assignments of error relate to the trial courts order that the County complied with the process mandated by the Public Records Act (PRA) and is not required to produce requested records or produce the claimed exempt records.

### A. **First Assignment of Error: Compliance with the Process Required by the Public Records Act**

Simpson assigns error to the trial courts written ruling of January 11, 2010, memorialized on March 26, 2010 that the County complied with the PRA's requirement of timely responses and disclosure of records under RCW 42.56.520, 42.56.070.

### B. **Second Assignment of Error: Reliance on the Exemptions to the Public Records Act**

Simpson also assigns error to the trial courts order of March 26, 2010, ruling that the County is not required to produce records or records in redacted form to Simpson. Specifically, Simpson assigns error to the trial courts finding first, that RCW 42.56.360(2) as incorporated in RCW 70.02.020 was properly relied on to deny access to public records.

### C. **Third Assignment of Error: Denial of Request for Okanogan County Prosecuting Attorney's Personnel File and Insurance**

Simpson also assigns error to trial courts finding that the County's claim of no records exist as adequate to address PRA request.

### D. **Fourth Assignment of Error: Failure to Grant Motion for Continuance to Conduct Pretrial Discovery**

Simpson also assigns error to the trial courts order denying Simpson's motion for continuance. Specifically, Simpson assigns error to trial courts finding that Simpson did not present what evidence would be established by further discovery.

**E. Issues Pertaining to Assignments of Error**

1. Did the Trial Court Err When It Found That the County Complied With the Process Required Under the PRA?

2. Did the Trial Court Err When it Found That an Affidavit or Declaration That a Record Does Not Exist is Adequate to Deny Access to Records?

3. Did the Trial Court Err When it Found That RCW 42.56.360 and RCW 70.02.020 Were Properly Used to Withhold Medical Records?

4. Did Trial Court Err When it Denied Simpson's Motion for Continuance to Conduct Pretrial Discovery?

**III. STATEMENT OF CASE**

**A. Factual Background**

This appeal involves four separate PRA requests by Franklin R. Simpson (Simpson) on September 17, 2008. These PRA requests were for (1) Simpson's criminal discovery/litigation file, (2) the personnel file of Okanogan County Prosecutor Karl F. Sloan (Sloan), (3) the bond and liability insurance of Karl F. Sloan as required by statute, (4) Sloan's oath of office.

**1. Simpson's Public Records Requests are As Follows**

Request one: sought the prosecuting attorney's criminal litigation/discovery file pertaining to Franklin R. Simpson, Okanogan County cause #04-1-00281-6. Request one specifically requested the documents contained in the prosecuting attorney's litigation/discovery file used to prosecute the above-entitled cause number.

Request two: sought all documents in the personnel file of prosecuting attorney Sloan, including performance evaluations, employee conduct reports, complaints or any documents relating to the performance of this official duties within the Okanogan County Prosecuting Attorney's office.

Request three: sought a copy of the oath of office of Sloan.

Request four: sought a copy of Sloan's bond and liability insurance as required by statute.

## **2. Simpson's September 17, 2008, Request Letter**

In his September 17, 2008 letter (CP 53), Simpson specifically stated these requests were pursuant to the Public Records Act of RCW 42.56.

Stephen Bozarth, deputy prosecuting attorney, replied to Simpson on September 25, 2008 (CP 56-7), acknowledging that the County had received the public records request. The County indicated that "most, if not all, of the documents" pertaining to request one were subject to disclosure. Although the County asked for clarification on whether Simpson requested the entire file of specific documents.

The County claimed no documents exist that meet Simpson's group two request. Stating that "Mr. Sloan is not an employee of Okanogan County, he is an elected official."

The County enclosed a copy of the oath of office of Mr. Sloan (CP 59). Thus, satisfying Simpson's group three request. Lastly, the County claim no documents meet Simpson's group four records request.

On October 12, 2008, Simpson wrote to the County to provide the requested clarification for group one. Indicating that if any documents are withheld or redacted, a privilege log of the documents claimed as exempt from disclosure or redactions is required by the PRA. (CP 61-2)

Also, Simpson refuted the County's claim that Karl Sloan is not an employee of Okanogan County and not subject to the PRA. Pointing out that, Sloan is a public servant elected to serve the people of Okanogan County. Thus, he is an employee of the County, he answers to the people of Okanogan County and is accountable for his public service, and any public records generated thereby. CP 61-2

In regards to group four of Simpson's records request, he asks the County to review RCW 26.15.050 and RCW 36.16.136. The statutes that require each public official designated as Prosecuting Attorney and/or Deputy Prosecuting Attorney to maintain the liability insurance and bond, even if the County insures payment and coverage of such. CP 62

On October 20, 2008, the County mailed a letter (CP 64) to Simpson informing him a total of 393 pages of documents were available for disclosure pertaining to group one of his records request. This letter was devoid of any responses to groups two or four records request. CP 64

On October 26, 2008, the County mailed a letter along with 393 pages of documents claimed as responsive to group one of Simpson's records request. (CP 66)

on March 8, 2009, Simpson mailed a letter informing the County of several deficiencies in the litigation/discovery file documents mailed to Simpson on October 26, 2008. The missing items were; (1) written witness statements;(2) Simpson's written statement;(3) ballistics test information;(4) medical records of victim (redacted);(5) finger print test information;(6) all police reports;(7) witness list. CP 77

Simpson then goes on to renew the group two records request for all documents contained in the personnel file of prosecuting attorney Sloan, including performance evaluations, conduct reports, complaints or any other documents relating to the performance of his official duties within the Okanogan County Prosecuting Attorney's office. CP 77

On March 16, 2009, the County mailed a letter to Simpson informing him that his March 8, 2009 letter was being considered as a new request. Reason being the items listed as missing from the documents received were not located within the litigation/discovery file. CP 79

On March 23, 2009, Simpson mailed a letter to the County informing the County that the March 8, 2009 letter should not be considered a new request. Simpson asked whether there is a second file containing documents responsive to the group one (cause #04-1-00281-6) of his records request and inquiring as to why was it not utilized to respond to the original request. CP 82

On March 27, 2009, the County mailed a letter along with 192 pages of documents listed as items 1-3,5-7 (missing items) from litigation/discovery file as listed in Simpson's March 8, 2009 letter (CP 77). Noting that 137 pages of documents claimed as exempt from disclosure in their entirety per RCW 42.1 7.312 pursuant to RCW 70.02.020 (CP 84). The County again failed to respond to renewed request for Sloan's personnel file.

On April 28, 2009, Simpson mailed a letter to the County to confirm receipt of the 192 pages of documents claimed responsive to Simpson's letter dated March 8, 2009 (CP 77). After reviewing the documents, Simpson questions why the documents were not included with the first 393 documents mailed on November 26, 2008. Simpson asks the County why they failed to provide an exemption log for the 137 pages of documents claimed exempt in their entirety and to explain how the exemption applies to the specific records withheld. CP 87

Simpson again renews his group two request for prosecuting attorney Sloan's personnel file, including performance evaluations, conduct reports, complaints or any other documents relating to the performance of his official duties within Okanogan County Prosecuting Attorney's office. CP 88-9

On May 6, 2009, the County mailed a letter to Simpson addressing his April 28, 2009 letter. First, the County claims the 192 pages were not in the litigation file, rather they were retained in a digital format. The county stated "in the interest of completing the matter, I have had my staff review

all materials pertaining to your case and have enclosed all remaining documents held by our office, in any file in any format." (letter referred to in declaration of Bozarth (CP 49). Second, the County states that the 137 pages of medical records are one record and do not require an exemption log. CP 49-50

Finally, the County claims that Karl Sloan is an elected official, not an employee of Okanogan County, so no records meet Simpson's group two request.

**3. The County's Release of Records Responsive to Group One of Simpson's Request**

Although the County was willing to produce records, it would only produce some of the records. Following guidelines set forth in the PRA, Simpson appealed the County's decision, noting several missing items from the group of documents mailed on October 26, 2008. The County responded in a letter dated March 16, 2009 (CP 79) stating that Simpson's appeal was being considered as a new request.

Simpson received records from the litigation/discovery file from October into early May 2009—seven months after initiating his public records request. Rather than providing the documents Simpson requested, the County withheld some documents in their entirety. The County mailed another 192 pages of documents with a letter explaining why those 192 pages were not provided with the first 393 documents. The County claimed 137 pages of documents were exempt from disclosure. Again, the County failed to provide an exemption log.

The County mailed the last group of documents on May 6, 2009. In their letter they state "I have had my staff review all materials pertaining to your case and have enclosed all remaining documents held by our office, in any file and in any format." (Mr. Bozarth refers to this letter in his declaration in support of defendant's motion for summary judgment. CP 49)

## **B. Procedural History**

On July 20, 2009, Simpson filed his complaint for an order for Show Cause against Okanogan County and Okanogan County Prosecuting Attorney Karl F. Sloan, claiming the County violated the PRA by failing to provide the requested records. CP 1-13

The County filed Notice of Appearance of August 14, 2009, Christopher J. Kerley of Evans, Craven & Lackie filed Notice of Association of Council on September 11, 2009.

The County then filed their Answer to Complaint for Order to Show Cause on September 24, 2009. CP 14-23

Between September 7, 2009 thru October 27, 2009 Simpson attempted to arrange a discovery plan to determine whether an adequate search was done or possible negotiation of a reasonable assessment of statutory penalties. CP 107-125

Simpson commenced discovery by serving on the County one set of Interrogatories and Requests For Production on October 27, 2009. CP 177-188

The County filed for Summary Judgement on November 19, 2009 (CP 24-5) along with the County's Memorandum of Authorities in Support of Motion for Summary Judgement. CP 26-41

Attorney Christopher J. Kerley filed a Declaration for Records submitted on December 10, 2009 for in-camera review of medical records he received by the County. CP 90-2

On December 22, 2009, Simpson filed a Motion to Continue Summary Judgement along with Memorandum in Support of Motion to continue Summary Judgement Proceedings (CP 98-141). Simpson also filed a Motion to Compel Discovery with a Declaration and Memorandum in Support of the Motion pursuant to CR 37 (CP 142-169). This order was sought to compel the County to respond to written discovery along with production request.

On December 29, 2009, the County filed its Response to Plaintiff's Motion to Continue Summary Judgement and To Compel Discovery along with a Declaration of Christopher Kerley in Support of Defendant's Response to Plaintiff's Motion to Continue Summary Judgement and To Compel Discovery.

On December 31, 2009 the trial court held the Summary judgement hearing. In an order memorializing her January 11, 2010 written ruling, Honorable Judge Baker held that the County had complied with the PRA, the 137 pages of medical records were subject to exemption pursuant to RCW 42.56.360 and RCW 70.02. Finally, the Honorable Judge Baker ruled that an affidavit or declaration that a record does not exist is adequate to address the PRA as a matter of Summary Judgement.

#### IV. ARGUMENT

I. Standard Of Review: The Court of Appeals review a trial courts grant of summary judgement de novo, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1P.3d 1124(2000). Summary judgement is proper if there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law. CR 56(c) "A material fact is one that affects the out come of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220(2005). When considering a summary judgement motion the court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. *Lybbert*, 141 Wn.2d at 34. Factual issues may be decided as a matter of law only if reasonable minds could reach but only one conclusion. *Sherman v. State*, 128 Wn.2d 164, 184, 905, P.2d 355(1995).

II. Public Records Act: The public records provisions of the public disclosure act were enacted in 1972 by initiative, formerly 42.17 RCW., now codified at chapter 42.56 RCW. The PRA is a "strongly worded mandate for the broad

disclosure of public records.'" Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 250-51, 884 P.2d 592(1994)(quoting Hearst Corp. v. Hoppe., 90 Wn.2d 123, 127, 580 P.2d 246(1978)). Courts must liberally construe the PRA's disclosure provisions to promote full access to public records and narrowly construe its exemptions. Former, 42.17.251(1992) We are cognizant of the PRA's policy "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." Smith v. Okanogan County, 100 Wn.App 7, 11, 994 P.2d 857(2000)(quoting former RCW 42.17.340(3)(1992).

**A. The Trial Court Improperly Allowed the County to Disregard the Public Records Act's Requirement in Responding to Simpson's Request for Public Records**

The PRA requires several actions by agencies that receive requests for public records. First, RCW 42.56.100, requires agencies to "provide for the fullest assistance to inquirers and the most timely possible action on requests for information." Second, RCW 42.56.520, requires agencies to make prompt responses-within five business days of receiving the records request, and when access is denied to specify the reasons thereof. The agency must supply an explanation for each denial of access that details which exemption applies and how that applies to the records request. RCW 42.56.210(3). Third, RCW 42.56.080, requires agencies to make public records themselves "promptly available to any person" upon request. An agency may not withhold a record in its entirety if only some information is exempt. In those cases, RCW 42.56.210(1) requires agencies to segregate the exempt information and produce the record in redacted form. RCW 42.56.210(1)("exemptions of this section are inapplicable to the extent that information the disclosure of which would violate personal privacy or vital government interests, can be deleted from

the specific records sought.") Finally, the PRA prohibits agencies from denying access unless an exemption applies and from discriminating based on the identity of the requestor or the purpose of the request. RCW 42.56.080

The County failed to promptly produce all responsive documents. The County provided 393 pages of documents on November 26, 2008 (CP66) then sent another 192 pages on March 27, 2009 (CP 84). In the Declaration of Stephan Bozarth in Support of Defendant's Motion for Summary Judgment he refers to his May 6, 2009 letter (CO 49) that states "I had my staff review all material pertaining to your case and enclosed all remaining documents held by the Prosecuting Attorney's office, in any file and in any format." This is three groups of documents claimed responsive to Simpson's September 17, 2008 group one request given at three different times. While an agency may, under limited circumstances, require for more than five days to identify and disclose responsive documents such a delay must be "reasonable". RCW 42.56.520

When the County did respond, it failed to cite any exemptions for withheld documents. The County failed to provide an exemption log pursuant to RCW 42.56.210(3). When the County withheld 137 pages of public records in their entirety. The County's response letters discussed herein were insufficient to claim a valid exemption to silently withhold 137 pages of public records.

The Supreme Court in PAWS II, 125 Wn.2d 243, 252, 884 P.2d 592(1994) emphasized the need for particularity in identification of records withheld and exemptions claimed:

The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means

of identifying and individual record which are being withheld in their entirety. Not only does this requirement ensure compliance with the statute and provide an adequate record on review, it also dovetails with the recently enacted ethics act.

Consistent with this reasoning, a valid claim of exemption under the PRA should include the sort of "identifying information" a privilege log provides. ID. Indeed, RCW 42.56.210(3) requires identification of a specific exemption and an explanation of how it applies to the 137 individual agency records the County is withholding in their entirety.

Under RCW 42.56.210(3), an agency such as Okanogan County must provide a statement of the specific exemption and a brief explanation of the reasons for withholding a record (in whole or part) as its response to Simpson's request. This allows Simpson to determine if the claimed exemptions are valid. See PAWS II, 125 Wn.2d 243; Citizens for Fair Share v. State Dep't of Corr., 117 Wn.App 411, 431, 72 P.3d 206(2003) review denied, 150 Wn.2d 1037(2004).

A brief explanation or index of records would describe, for example, to whom the records were addressed and from whom they came, the subject, the date, and a brief explanation of why the agency (Okanogan County) believes the record is exempt. Failure to provide a brief explanation of the grounds for withholding 137 pages of public records violates the Act making the requester the "prevailing party" entitled to attorney's fees, costs and penalties. Citizens for Fair Share, 117 Wn.App at 431.

During summary judgement the County failed to show that it acted in accordance with the statute. Nor did the County submit affidavits describing the agencies search procedures and the adequacy of the search performed to find responsive documents.

In the case of Simpson's requests for public records, the County violated numerous requirements of the PRA and the trial court improperly allowed it to

do so without liability.

**B. RCW 70.02.020 Applies Only to the Extent the Record Identifies or Can Be Readily Associated with the identity of a Patient**

The trial court erred in its interpretation of RCW 70.02.020, a provision of the Uniform Health Care Information Act. The trial court improperly construed the exemption broadly.

The statute defines "health care information" as "any information...that identifies or can readily be associated with the identity of a patient and directly relates to the patients health care." RCW 70.02.010(6) the Uniform Health Care Information Act prohibits the unauthorized disclosure of health care information about a patient. RCW 70.02.020.

The PRA expressly incorporates Chapter 70.02 as controlling the public inspection and copying of health care information of patients. RCW 42.56.360(2). As with all exemptions under the PRA, the burden is on the agency to prove the exemption applies. RCW 42.56.550 The burden applies regardless of whether the agency refused to disclose parts of the requested records or the records in their entirety. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 683, 790 P.2d 604(1990)("PAWS")("An agency which discloses only edited parts of a public record has the burden of proving that full disclosure is not required.")

Here the trial court, with its broad construction of the exemption, endorsed the County's reliance on RCW 70.02.020 to withhold documents in their entirety. Despite the statutory definition limiting health care information to information identifying of readily associated with the identity of a patient and directly relating to that patient's health care, the trial court allowed the exemption to cover the entire record.

The law does not support the trial court's decision. The plain language of the

Washington's Uniform Health Care Information Act is clear: a health care provider may not, without either patient or statutory authorization, disclose information that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care. Withholding patient's name and other identifiers takes the record out of the statutory definition of "health care information" and thus out of the bounds of the health care information exemption.

The Division III Court of Appeals in the unpublished case of *Jeckle v. Attorney General's Office*, 128 Wn.App 1015, No. 22730-8-III, 2005 WL 1502047 (June 23, 2005), held that disclosure of records by the Attorney General's Office under the PRA did not violate Chapter 70.02 RCW because the Attorney General was not a health care provider. Once the agency obtains a medical record, the record becomes a "public record" as defined in the PRA (although it or parts of it might still be exempt from disclosure). See *Oliver v. Harborview Medical Center*, 94 Wn.2d 559, 566 P.2d 76(1980).

Releasing the requested records with redactions of information associated with the identity of the patient sufficiently protects the interests of the patient. In contrast, affirming the County's total withholding of documents under RCW 70.02.020 goes beyond the interest of patient privacy to merely serve the interests of the County.

**C. The Trial Court Improperly Allowed the County to Disregard Simpson's Requests for Okanogan County Prosecuting Attorney's Personnel File and Bond**

Here the trial court allowed the County to avoid its obligation under the PRA by failing to provide its fullest assistance to Simpson's records request pertaining to the personnel file of Okanogan County Prosecutor, Karl F. Sloan (CP 53) by not searching all departments within the County for responsive records to the requests.

The County's answers to first set of interrogatories (CP 185-6), question number #8 asked to "Describe in detail what type of file is maintained by the Okanogan County that would include for retention any documents pertaining to the official duties of Karl Sloan." The County responded "The agency at issue is the Okanogan County Prosecuting Attorney's office. The Prosecuting Attorney's office does not maintain a file containing documents pertaining to the official duties of Karl Sloan" clearly demonstrates that the County's search for responsive records did not go beyond the department where the request was received. Because the agency must provide the "fullest assistance" to a requestor, a requestor is not required to name the exact department within the agency to which the request is made. Instead a request must merely be made to an "agency" which is defined to include all departments and sub units of that agency. See RCW 42.56.010(1)

Several cases have noted or implied that an "agency" includes its various departments and subunits. See *Ames v. City of Fircrest*, 71 Wn.App 284, 291, 857 P.2d 1083(1993)(request to city for records of city police department); *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995(1993)(noting prosecuting attorney's office is a department of a county); *Vance v. Offices of Thurston County Commissioners*, 117 Wn.App 660, 668, 71 P.3d 680(2003), review denied 151 Wn.2d 1013(2004) (request to one agency department can be answered by another department).

In this case, Simpson is forced to ferret out records by finding what department maintains the public records sought, ["The PRA reflects the belief that the public should have full access to information concerning the working of the government."] *Newman v. King County*, 133 Wn.2d 565, 570 947 P.2d 712(1997). Therefore, the County violated numerous requirements of the PRA,

and the trial court improperly allowed it to do so without liability.

**D. The Trial Court Improperly Denied Simpson's Motion for Continuance of Summary Judgement**

The trial court erred in finding that the requested discovery could not effect the outcome of summary judgement and denying Simpson's motion.

The discovery which was commenced in the first set of interrogatories and request for production (CP 177-187) sought documents pertaining to the policies, procedures or instructions used by the County when processing PRA requests. The discovery also sought the type of file maintained by the County that would include any documents pertaining to the official duties of Karl F. Sloan.

The untimely responses and objections to the first set of interrogatories was not received until December 24, 2009, seven days before summary judgement. Which did not allow Simpson to properly defend against summary judgement.

Second, Simpson sought the signed medical release obtained by the County to demonstrate how the County acquired the medical records. Once the County took possession of these documents they became "public records" as defined by RCW 42.56.010. *Oliver v. Harbor View Med. Center*, 92 Wn.2d, 559, 566, P.2d 76(1980).

The trial court removed the burden of showing it acted in accordance with the PRA by forcing Simpson to demonstrate how discovery would show how the County acted improperly.

**E. Okanogan County Should Ensure its Employees are Adequately Trained to Recognize and Process Public records Requests**

The PRA requires each agency to designate a public records officer to be the "point of contact" with the agency for members of the public. RCW 42.56.580(1) also see WAC 44-14-02002. The public records officer and all other persons assigned with responsibility to coordinate or prepare responses

to public records requests must be appropriately skilled and trained for the responsibility. See WAC 44-14-00005 ("All agency employees should receive basic training on public records compliance and records retention; public records officers should receive more intensive training).

Here the County has no written policy or procedures on handling public records requests as required by RCW 42.56.040(1). As demonstrated in Defendants Answers to Plaintiff's First Set of Interrogatories and Requests for Production (CP 181). The County's answer to interrogatory #1 "Okanogan County Prosecuting Attorney's office has no written policy or procedure describing how the office should respond to Public Records Act request."

Stephan Bozarth, deputy prosecuting attorney for Okanogan County, is responsible for handling PRA requests for the Okanogan County Prosecutor's office. The County's answer to interrogatory #3 (CP 182) of Plaintiff's First Set of Interrogatories state "Mr. Bozarth is an attorney licensed to practice in the State of Washington. As such he is familiar with the requirement of RCW 42.56 et seq and interpreting case law."

The fact that Bozarth is a licensed attorney in the State of Washington and is "familiar" with the requirements of the PRA does not mean he is adequately trained for the responsibilities of processing PRA requests from citizens of Okanogan County. **I**t does not help the County's position it complied with Simpson's request by their own admissions through answers to discovery clearly and emphatically demonstrates the County has not adopted policy, procedures or rules to ensure any effective Compliance under the Act. Thus, clearly violating Simpson's right under the PRA.

**F. This Court Should Recognize Simpson as the Prevailing Party For Purposes of the Statutory Penalty and Award of Attorney's Fees**

Pursuant to RAP 18.1, Simpson hereby requests reasonable attorney's fees and expenses. RAP 18.1(a). The PRA provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney's fees incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.

RCW 42.56.550(4). This provision mandates fees and costs to the prevailing party at both the trial court and on appeal. PAWS I, 114, Wn.2d at 690; *Linstrom v. Ladenburg*, 85 Wn.App 524, 534, 933 P.2d 1055(1997).

A prevailing party is "one who has an affirmative judgement rendered in his favor at the conclusion of the entire case." *Tacoma News, Inc, v. Tacoma-Pierce County Health Dep't*, 55 Wn.App 515, 525, 778 P.2d 1066(1989).

A party prevails even though portions of the requested documents are found to be exempt. *Id*; see also PAWS I, 114 Wn.2d at 684. A party also prevails where "the existence of the lawsuit has a causative effect on the release of the information." *Doe I v. Washington State Patrol*, 80 Wn.App 296, 303, 908 P.2d 914(1996)(granting fees to PDA requestor)(quoting *Coalition on Gov't Spying v. King County Dep't of Public Safety*, 59 Wn.App 856, 864, 801 P.2d 1009(1990)(quoting *Miller v. United States Dep't of State*, 779 F.2d 1378, 1389(8th Cir. 1985))).

The attorney's fees provision of the PRA "is intended to encourage broad disclosure and to deter agencies from improperly denying access to public records." *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 746, 948 P.2d

805(1997); see also Hoppe, 90 Wn.2d at 140. Requestors who challenge violations of the PRA are acting as private attorney's general protecting the rights of all citizens to access to information and to government responsiveness and accountability. As with other civil rights laws, challenges must be awarded full attorney's fees and costs to encourage others to assume this burden and to ensure that government abuses do not go unquestioned and unchallenged. Conversely, reduced fee awards discourage the public from exerting its rights and embolden agencies like Okanogan County to improperly block access. In light of these potential consequences, courts must liberally construe the attorney's fees provision. PAWS I, 114 Wn.2d at 682; see Hoppe, 90 Wn.2d at 130. The goal is to encourage disclosure and the agency's motives are irrelevant. See DOE I, 80 Wn.App at 301-02. Only "strict enforcement" of fee "will discourage improper denial of access to public records." PAWS I, 114 Wn.2d at 686.

Further, Simpson is entitled to fees and the statutory penalty because of the County's numerous violations of the PRA in addressing Simpson's requests. Delay and lack of "fullest assistance to inquirers" alone justify an award of fees and statutory penalties. DOE I, 80 Wn.App at 303-04 (superior court abused its discretion in failing to award statutory penalty where agency failed to give requestor the "fullest assistance" required by the PRA).

Finally, the PRA's fees and costs provision also mandates an award of a statutory penalty for each day that the agency denied the requestor the right to inspect or copy a public record. RCW 42.56.550(4); ACLU of Washington v. Blaine School Dist. No. 503, 95 Wn.App 106, 111, 975 P.2d 536(1999); see also Limstrom v. Ladenburg 136, Wn.2d 595, 617, 963 P.2d 869(1998); Amren v. City of Kalama, 131 Wn.2d 25, 29, 36-37, 929 P.2d 389(1997).

The decision is not discretionary, so the prevailing party does not need to prove damages. Amren, 131 Wn.2d at 36; Yacobellis v. City of Bellingham, 64

Wn.App 295, 103, 825 P.2d 324(1992). The Court must award some penalty; the only discretion is in setting the amount that must be between \$5 per record per day and \$100 per record per day. ACLU, 95 Wn.App at 111, RCW 42.56.550(4)(statutory language says penalty is per record per day).

Just as with mandatory attorney's fees, a mandatory penalty is essential to the underlying policy of the PRA to promote full disclosure. Amren, 131 Wn.2d at 36-37; Yacobellis, 64 Wn.App at 103. "Strict enforcement" will prevent agencies from improperly denying access. Amren, 131 Wn.2d 36-37.

Because the penalty must encourage agencies to allow access, neither the agency's motives nor the interests of outside parties are relevant. The agency's good or bad faith only becomes relevant in determining the size of the penalty. Id at 111-112; Lindström, 136Wn.2d at 617.

Here, the County's bad faith was apparent in its slow release of documents. The County received the request for 4 groups of public records in September 2008, 7 months-and numerous appeals and repeated requests for documents by Simpson-later, the County Still withheld documents. This Court should require a penalty of at least \$60 per record per day to deter future bad faith conduct by Okanogan County.

#### **V. CONCLUSION**

For the reasons stated above, Simpson requests that this Court reverse the trial courts decision finding that Okanogan County complied with the process required by the PRA, finding that the County properly withheld documents under RCW 42.56.360(2) and 70.02.020 and denying Simpson's motion for continuence. Simpson also requests this court direct the County to release the requested records in accordance with this Court's decision. Finally, Simpson requests that this Court award Simpson reasonable attorneys' fees and costs plus the statutory penalty for each day and for each record withheld in violation of the PRA.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of July, 2010.

By 

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