FILED
COURT OF APPEALS
DIVISION II

08 SEP 23 AM 10: 13

STATE OF WASHINGTON
BY
DEPUTY

No. 35920-1-II

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

THE HONORABLE RICHARD B. SANDERS,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

RESPONSE AND REPLY BRIEF OF THE HONORABLE RICHARD B. SANDERS

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pm 9-22-08

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I. INTRODUCTION

Washington's Public Records Act (the "PRA")[1] requires that public agencies "provide for the fullest assistance to inquirers." RCW 42.56.100; *see also O'Neill v. City of Shoreline*, __ Wn. App. __, 187 P.3d 822, 828 (2008). Inherent in this basic obligation are the general requirements to timely produce requested records, properly and promptly state any claims of exemption, and explain those claims of exemption to the requester. But the trial court found that the Attorney General's Office ("AGO") did not comply with these statutory mandates. Instead, the AGO failed to produce documents, provided an inadequate exemption log, and did not explain its claimed exemptions. Because of these failings, Justice Richard B. Sanders ("Justice Sanders") filed this suit.

Even after the lawsuit was filed, the AGO produced additional inadequate exemption logs, designated a CR 30(b)(6) witness unable to testify on the designated deposition topics, and made multiple subsequent productions of documents it should have disclosed at the outset. Only after the parties filed cross-motions for summary judgment, did the AGO file "Appendix A," and finally attempt to explain the claimed exemptions (which had changed substantially). But the PRA does not permit an

[1] Currently codified in chapter 42.56 RCW. Formerly chapter 42.17 RCW. Consistent with Justice Sander's Opening Brief, all citations to the

agency to attempt compliance with statutory requirements only at the end of protracted PRA litigation. The AGO's actions (and its arguments in its response brief) evidence a continued pattern of avoidance and hostility towards Justice Sanders.

The trial court correctly ruled that the AGO wrongfully withheld certain documents, and produced an inadequate exemption log without any explanations of the claimed exemptions. Its rulings to deny the AGO's motion for summary judgment, assess penalties for the violation of the brief explanation requirement and award penalties for every day a record was wrongfully withheld, should also be affirmed. But the trial court erred in its assessment of penalties and award of fees against the AGO, and in refusing to release other documents that are not exempt. These rulings should be reversed.

II. ARGUMENT

A. Justice Sanders Did Not Submit a Public Records Act Request For Only Those Documents Produced to Tim Ford.

In its cross-appeal, the AGO attempts to resurrect its argument that Justice Sanders somehow requested only those documents actually produced to Tim Ford. *See* Respondent's Br., at pp. 21-23. This argument is contrary to the law and the record.

PRA are made to the current codification.

First, there is simply no legal basis for the AGO's claim that it can unilaterally modify a PRA request. The AGO cannot evade its PRA obligations by claiming it produced everything it agreed to produce, any more than it could evade a discovery obligation in the same way. The Washington Supreme Court has expressed its intolerance for such conduct: "[T]he discovery rules do not require [a party] to produce only what it agreed to produce or what it was ordered to produce. The rules are clear that a party must *fully* answer all interrogatories and requests for production, unless a specific and clear objection is made." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 353-54, 858 P.2d 1054 (1993) (emphasis in original).

In the PRA context, the balance tips even more in favor of disclosure and production. The PRA "is a strongly worded mandate for broad disclosure [and production] of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Again the PRA requires that the public agency "provide for the fullest assistance to inquirers." RCW 42.56.100; *see also O'Neill*, 187 P.3d at 828. With these principles in mind, the AGO had a duty to facilitate, rather than impede, public disclosure and production. Any doubts regarding Justice Sanders' request must be resolved against the AGO and in favor of public disclosure and production.

Second, the AGO's argument that Justice Sanders modified his request to accept only those documents produced to Tim Ford does not comport with its actual conduct in this case and the evidence in the record. If the AGO believed Justice Sanders' PRA request was only for those documents produced to Mr. Ford, there was no reason to provide Justice Sanders the Entire Document Index ("EDI") or any subsequent exemption log. But the AGO provided multiple (albeit inadequate) logs to Justice Sanders, because it had not concocted its *post hac* explanation until it moved for summary judgment.

The AGO now argues that Justice Sanders could not challenge any of the AGO's claimed exemptions on the EDI or other logs because the trial court ruled that Mr. Ford's request was broader. Respondent's Br., at pp. 21-23. Even assuming that a response to a broader request may satisfy a narrower concurrent or subsequent request, the AGO's argument that Justice Sanders is then precluded from challenging withheld documents is baseless. An agency cannot cut off subsequent and concurrent requestors from challenging exemptions merely because it provides the same documents to more than one party. Each requester must enjoy the same standing to challenge any claimed exemptions. The AGO's argument that it is entitled to summary judgment because Justice Sanders cannot

challenge what was withheld from his production flies in the face of the PRA's policy of open government. *See* RCW 42.56.030.

Moreover, the AGO's contention that Justice Sanders only requested the documents that the AGO actually produced to Mr. Ford is unsupported by the factual record. Justice Sanders never agreed to accept only those documents produced to Mr. Ford. CP 475-476 ¶¶ 5-7. There is no evidence of any mutual agreement to narrow Justice Sanders' request. *See e.g.*, CR 2A (courts will not regard an issue as agreed upon "unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same"). To the contrary, the AGO's Public Records Manager, La Dona Jensen, told Justice Sanders' counsel, Kurt Bulmer, that Mr. Ford's request was broader than Justice Sanders' request. CP 475 ¶ 5. Mr. Bulmer told Ms. Jensen that Justice Sanders "would not object to additional documents being included in the response...so long as nothing...was excluded." CP 475-476 ¶ 6 (emphasis added). Mr. Bulmer never agreed that the AGO could refuse to produce documents to Justice Sanders simply because the AGO refused to produce those same documents to Mr. Ford. CP 475 ¶ 5. Ms. Jensen later confirmed that Justice Sanders "wished to expand" his request. CP 484. Nothing in this exchange remotely suggests Justice Sanders waived his right to contest claimed exemptions.

Finally, the trial court ruled that the AGO wrongfully withheld documents, CP 1846, and the AGO does not dispute or appeal this ruling. *See* Respondent's Br., at p. 23 ("The AGO does not contest the court's thorough Opinion regarding...the arguments on which each party prevailed...."). As the AGO does not contest that it wrongfully withheld documents, there would be no basis to reverse the trial court's denial of summary judgment. The AGO's primary cross-appeal argument should be rejected and the trial court's denial of summary judgment to the AGO affirmed.

B. The AGO's Subsequent Production of Documents After the Initiation of Litigation Violated the PRA.

The AGO ignores Justice Sanders' arguments regarding the Subsequent Production Documents. The AGO neither offers legal support for its claim that the Subsequent Production Documents were exempt, nor establishes that it reserved any purported exemptions for the produced documents. As such, the trial court should have ruled that the AGO's subsequent production after litigation began violated the PRA, and factored this violation into its fees and penalties analysis.[2]

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[2] The AGO states repeatedly in its brief that Justice Sanders made no attempt to obtain records prior to filing suit. Although this is legally immaterial, it also misstates the record, as Justice Sanders did meet personally with Attorney General McKenna prior to filing this action. CP 423.

It is now well established that subsequently producing documents does not immunize the AGO from liability under the PRA. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005); *West v. Thurston County*, 144 Wn. App. 573, 581, 183 P.3d 346 (2008). An agency that subsequently produces documents as a result of litigation violates the PRA where it has not successfully established its claims of exemption. *Spokane Research*, 155 Wn.2d at 103-04.[3]

The AGO characterizes its subsequent production of 33 documents after litigation was initiated as an attempt "to minimize the disputed items." Respondent's Br., at p. 11. It defies logic, however, that the AGO would decide to produce some exempt documents while withholding others. The subsequent production of these documents after independent review is more supportive of the fact that the AGO determined it could not withhold those documents under the PRA. And "[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." *Spokane*

[3] The AGO continues to imply, as it did in the trial court, that *Spokane Research* is not binding precedent because Justice Sanders authored the opinion. *See* Respondent's Br., at p. 20 n. 82. The Supreme Court decided *Spokane Research* by a 9-0 vote. Regardless of whether or not the AGO agrees with the unanimous Supreme Court's decision, it is plainly binding precedent in Washington State.

Research, 155 Wn.2d at 103-04. Regardless of why the AGO now claims it subsequently produced documents, the fact that it withheld the records until Justice Sanders was forced to file suit is a violation of the PRA that demands an award of fees and penalties.

Further, the contents of some of the Subsequent Production Documents are contrary to the AGO's explanation that the documents were produced due to their "substantively innocuous" nature. *See* Respondent's Br., at p. 11. For example, the AGO fails to address how the "Brutus" e-mails are in any way exempt under the PRA. The AGO attempts to downplay the significance of the Brutus e-mails by placing them in a footnote and by only discussing them in the context of whether or not it acted in good faith for the purposes of fees and penalties. Respondent's Br., at p. 43 n. 140. The AGO summarily claims that the e-mails are work product without support and then explains that they were produced because they were innocuous. The content of the e-mails tell a different story. The AGO's obvious references to Justice Sanders when discussing killing "the king" are neither innocuous, nor protected work product.

Finally, while the AGO now argues that it never waived exemptions for the Subsequent Production Documents, Respondent's Br., at p. 32, there is no evidence in the record that the AGO ever reserved

exemptions for the documents it actually produced. The AGO cites to a cover letter that accompanied the Subsequent Production Documents when they were produced to Justice Sanders. Respondent's Br., at p. 11. However, in that letter the AGO never reserved exemptions for the produced documents; it only disclaimed a waiver "from disclosure as to the underlying attached documents" where a cover sheet was produced. CP 1093 (emphasis added). The underlying documents for which exemptions were reserved were not part of the Subsequent Production Documents.

The record demonstrates that the AGO never intended to claim exemptions for the Subsequent Production Documents, and that there are no exemptions to be claimed. The trial court erred in concluding that the entirety of the AGO's production after litigation was not a PRA violation.

C. The AGO Continues to Manufacture New Reasons to Explain Its Wrongful Withholding of Records.

1. The AGO's newest theory on how and when it claimed the attorney-client privilege is contrary to the facts and law.

The AGO twists both facts and law when it contends that it never shifted its claims of exemption. *See* Respondent's Br., at pp. 23-25. The AGO proffers it did not initially claim exemptions under the attorney-client privilege because it believed, at the time, that the attorney-client

privilege was part of the controversy exemption. *See id.* But the AGO specifically asserted the attorney-client privilege in its initial exemption log. CP 604. The AGO cannot argue that it thought the attorney-client privilege should have been claimed under the controversy exemption when it made a conscious decision to assert the attorney-client privilege as a separate exemption on the very same log. The AGO subsequently added the attorney-client privilege as a ground for exemption to additional documents, further frustrating Justice Sanders' efforts to understand the grounds for withholding. CP 443-444.[4] This shift cannot be explained, however, by the AGO's purported reinterpretation of the law.

The AGO's reliance on *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004), for the proposition that the controversy exemption is inclusive of the attorney-client privilege is misplaced. *See* Respondent's Br., at p. 24. *Hangartner* plainly holds that the attorney-client privilege statute is a separate ground for exemption under the PRA. *Hangartner*, 151 Wn.2d at 453 ("Because RCW 5.60.060(2)(a) [the

[4] The AGO contends that the record does not support that it asserted the attorney-client privilege 20 times in its Appendix A. *See* Respondent's Br., at p. 24 n. 91. Although the AGO claims that the cited pages of the record, CP 443-444, "nowhere makes that statement," Respondent's Br., at p. 24 n. 91, one must simply add the 18 documents where the AGO asserted the "Controversy Exemption/Attorney Client Privilege" on CP 443 ¶ 21 to the two times the AGO asserted the "Attorney Client Privilege" on CP 444 ¶ 23 to reach twenty total documents.

attorney-client privilege] is unquestionably a statute other than...RCW 42.17.310 [containing the controversy exemption]...documents that fall under RCW 5.60.060(2)(a) are exempt from the public disclosure act."). The Court in *Hangartner* explained that the "controversy exemption...will include some documents also covered by the attorney-client privilege...." *Id.* at 452. For an attorney-client privileged document to fall under the controversy exemption, however, the document must also be "relevant to a controversy" under the PRA. *Id.* *Hangartner* does not support the AGO's new explanation for its shifting claims of exemption.

2. The AGO incorrectly interprets the trial court's ruling on the attorney-client privilege.

The trial court erroneously ruled that "[n]either the language of the statute nor case law construing the privilege limits the privilege to communications between an attorney and client, or between two attorneys serving the same client, that convey legal advice." CP 1724 (emphasis added). The AGO concedes in its brief that the privilege only "applies to confidential communications for advice" and "where the communications reflect a request for, or the giving of, legal advice." Respondent's Br., at p. 27 (quotations and citations omitted) (emphasis added). The AGO attempts to spin the court's opinion by stating that "[t]he court did not so rule" that the attorney-client privilege applies to all communications

regardless of whether they seek legal advice. *Id.* at 28. The trial court itself stated, however, that "[o]nce an attorney-client relationship exists, any communication arising from that relationship is privileged...."[5] CP 1724 (emphasis added).

Notwithstanding the AGO's assertions to the contrary, the trial court based its ruling on an erroneous understanding of the privilege as "expansive." CP 1375. The AGO argues that the trial court used the term "expansive" to describe the Ninth Circuit's view of the privilege in *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996), Respondent's Br., at p. 28. This is not the case. The trial court categorized *Chen* as embodying a "narrow exception to what is otherwise an expansive view of the privilege...." CP 1375.[6] The characterization of the privilege as

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[5] The trial court rejected Justice Sanders' argument that the privilege only applies to communications regarding legal advice in the context of upholding a claim of exemption solely on attorney-client privilege grounds. CP 1375. Not in reference to the common interest doctrine as the AGO asserts. Respondent's Br., at pp. 28-29. The court discussed the common interest doctrine separately whenever it was at issue. *See e.g.*, CP 1381, 1403, 1404-1408, 1410, 1418 (documents #9, 10, 53, 55-63, 67, 83, and 84).

[6] In *Chen*, the Ninth Circuit held that the attorney-client privilege applied where attorneys were involved in making business decisions and acted as spokespersons for their client to the U.S. Customs Service, but were employed for their legal knowledge to help bring the client into compliance with the law. *Chen*, 99 F.3d at 1502. Justice Sanders cited *Chen* for the proposition that the attorney-client privilege is limited to communications involving legal advice. CP 1375. *Chen* supports this principle. *Chen*, 99 F.3d at 1501. The trial court's ruling that privileged

expansive comes from the trial court's own language. As the AGO notes in its brief, controlling Washington Supreme Court precedent holds that "'[t]he attorney-client privilege is a narrow privilege....'" Respondent's Br., at p. 29 (quoting *Hangartner*, 151 Wn.2d at 452). The trial court's erroneous interpretation of the privilege is not saved by the AGO's mischaracterization of the record.[7]

Further, the trial court erroneously applied the attorney-client privilege to communications between the AGO and Supreme Court Justice Gerry Alexander and between the AGO and DSHS employee Bernie Friedman. The fact that these two individuals submitted declarations that establish neither sought nor felt they received legal advice, CP 417, 447, is not evidence of an attempted waiver of the privilege by an employee, but evidence that any legal aspects of the communications were for the AGO's benefit and not the client agencies'. While an employee cannot waive an agency's attorney-client privilege, the "essence of the attorney-client

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communications must pertain to legal advice only "when the client hires an attorney for purposes other than legal advice or representation," CP 1375, finds no support in *Chen*, or anywhere else.

[7] The AGO purports that the trial court simply paraphrased *Hangartner* in its opinion. Respondent's Br., at p. 29. However, the trial court flipped *Hangartner* on its head by turning the word "only" into "any." *Compare* CP 1724 ("[o]nce an attorney-client relationship exists, <u>any</u> communication arising from that relationship is privileged....") (emphasis added) *with Hangartner*, 151 Wn.2d at 452 ("The attorney-client privilege is a narrow privilege and protects <u>only</u> 'communications and advice

privilege is the intent of the client at the time the communication is made." *Heidebrink v. Moriwaki*, 38 Wn. App. 388, 394, 685 P.2d 1109 (1984), *rev'd on other grounds*, 104 Wn.2d 392, 706 P.2d 212 (1985). The person at the agency best able to speak as to the intent of the client at the time of the communication is the employee who actually communicated with the AGO. Both Justice Alexander and Mr. Friedman testified to the client's intent. The trial court erred by applying the privilege in light of this evidence, and by expansively applying the privilege in general.

3. Adopting the judicially created common interest doctrine requires an impermissibly broad construction of exemptions to the PRA.

The AGO seeks to broadly construe the exemptions to the PRA by asking this Court to recognize a common law extension of the work-product doctrine. The common interest doctrine is not a statutory exemption to the PRA. The PRA only allows exemptions from public disclosure where a record fits squarely within a statutory exemption. *See* Laws of 1987, ch. 403, § 1, pp. 1546-47. Accordingly, the PRA's disclosure provisions are "liberally construed and its exemptions narrowly construed...." RCW 42.56.030. The common interest doctrine is a common law exception to waiver of the attorney-client privilege and work product doctrine. *See* II Edna S. Epstein, *The Attorney-Client Privilege*

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between attorney and client'....") (emphasis added) (citations omitted).

and the Work-Product Doctrine, 1038-46 (5th ed. 2007). Contrary to the AGO's description of the common interest doctrine as neatly fitting within existing exemptions, the rule "'has been described as an extension of the attorney client privilege.'" *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996) (emphasis added) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). Thus, "[c]ourts are beginning to resist some of the expansion of the common interest exception into new contexts." Epstein, *supra*, at 1042.

The Legislature could have included a common interest exemption in the PRA, much as Congress sought to exempt certain inter-agency communications through the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The governmental attorney-client privilege exemption to the FOIA expressly provides that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation" are exempt from disclosure. 5 U.S.C. § 552(b)(5) (emphasis added). The PRA includes no similar provision for the protection of inter-agency memorandums. The Washington Supreme Court has previously rejected adopting language from 5 U.S.C. § 552 that does not appear in the PRA. *Spokane Research*, 155 Wn.2d at 103 & n. 10 (stating that courts "will not read into the [PRA] what is not there" in holding that the FOIA standard for

"prevailing" parties does not apply in the PRA context). This Court should decline the AGO's invitation to adopt language not in the PRA by shielding all potentially privileged inter-agency communications from disclosure.

In the current case, application of the common interest doctrine is particularly inappropriate. The AGO produced exemption logs listing numerous third-party individuals with no explanation of who they were or why there was no waiver. Justice Sanders' concern as to the appropriateness of the claimed exemptions was understandably raised upon seeing documents being withheld when they had been widely distributed to third-parties. Justice Sanders was forced to bring suit in order to have the AGO explain it was attempting to apply the common interest doctrine. Even then, no explanation was provided until summary judgment.[8]

Further, the policy reasons behind the common interest doctrine do not support extension in the PRA context. The common interest doctrine allows that "when parties have a common adversary in litigation and are conducting a joint defense, they may share work product, including legal

[8] In attacking Justice Sanders' contention that Appendix A was the first time many of the exemptions were explained, the AGO cites only to its summary judgment motions to which Appendix A was an attachment. *See* Respondent's Br., at p. 32 n. 113.

theories, without thereby waiving the protection." Epstein, *supra*, at 1040. The "operative inquiry as to waiver is whether it enhances the prospect that an adversary would gain possession...." Epstein, *supra*, at 1040 (emphasis added). For communications between the AGO and County Prosecutors, the adversary against whom work-product protection may apply is the Special Commitment Center ("SCC") resident. *See* Respondent's Br., at p. 31. Justice Sanders was not the adversary in litigation for any cases the County Prosecutors were handling in consultation with the AGO.[9] In light of the strong policy for narrow exemptions under the PRA and the lack of any policy reasons to provide work-product protection to documents requested by Justice Sanders, the trial court decision to apply the common interest doctrine should be reversed.

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[9] The AGO also devotes a substantial portion of its brief to background about Justice Sanders, which is of no relevance to Justice Sanders' entitlement to records under the PRA. It does bear noting, however, that contrary to the AGO's implications, although Justice Sanders was admonished under Canons 1 and 2(A), he was exonerated of all allegations of *ex parte* contacts at the SCC by the Commission on Judicial Conduct and the Washington Supreme Court. CP 421; *In re Sanders*, 159 Wn.2d 517, 521, 145 P. 3d 1208 (2006). The AGO has refused to provide Justice Sanders a defense in that proceeding and, while the Court of Appeals affirmed that denial, the Supreme Court has granted review, which is now pending. *Sanders v. State*, 139 Wn. App. 200, 159 P.3d 479 (2007), *review granted*, No. 80393-5 (May 16, 2008).

4. The AGO asks the court to infer too much in its application of the controversy exemption.

The AGO effectively concedes that additional documents do not meet the legal standard for the controversy exemption by characterizing them as merely "adversarial in tenor." *See* Respondent's Br., at p. 26. Documents fall under the protection of the controversy exemption only where they relate to "'completed, existing, or reasonably anticipated litigation.'" *Hangartner*, 151 Wn.2d at 449 (quoting *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993)). The Supreme Court has stated that a "litigation-charged atmosphere" is insufficient to establish reasonably anticipated litigation under the PRA. *Id.* at 450. The AGO's claim that the documents are exempt due to their adversarial "tenor" fails even to meet the level of a litigation-charged atmosphere, particularly when many of the documents were dated "months before Justice Sanders sued the State...." Respondent's Br., at p. 26.

The AGO once again notes that while some documents do not refer to any relevant controversy on their face, their connection to a controversy should be inferred based on contemporaneous documents. Respondent's Br., at p. 26. The AGO cites no case law in support of this contention. Nor does it explain how Justice Sanders, as the requester, was supposed to infer such a connection when the AGO did not provide any explanation

until it moved for summary judgment. The AGO cannot support exemptions for documents where it asks the court to look at a document with the benefit of hindsight and context that it did not provide to Justice Sanders.

As argued above, the AGO's overly expansive view of the controversy exemption is demonstrated by its continued insistence (albeit solely in a footnote) that the "Brutus" e-mails are exempt under the PRA without providing any supportive legal argument. *See* Respondent's Br., at p. 43 n. 140. These documents' non-exempt status is underscored by the fact that the AGO's outside counsel decided that the documents had to be produced upon independent review. The trial court erred in its application of the controversy requirement.

D. The Trial Court Erred by Considering Appendix A as Substantive Evidence to Support Claimed Exemptions.

The AGO's description of Appendix A as containing only "cover sheets" is misleading. Respondent's Br., at pp. 35-36. The AGO had the opportunity (and the obligation) to explain to Justice Sanders at the time of its response to his PRA request its decision to withhold public records from disclosure. RCW 42.56.210(3). The AGO failed to provide any evidence to support its reasoning regarding its claimed exemptions under the PRA. It was only for the purposes of summary judgment that the

AGO created Appendix A, containing 27 pages of previously undisclosed and unexplained reasoning and purported factual support for non-production.

The most troubling aspect of Appendix A is that it was produced after Justice Sanders specifically sought discovery to understand the AGO's rationale and justification for invoking each individual exemption through a CR 30(b)(6) deposition. CP 499-501. The AGO, not Justice Sanders, bore the burden of complying with the obligations of CR 30(b)(6). The AGO should have produced the witnesses necessary to address the request or, alternatively, prepared its CR 30(b)(6) designee to provide meaningful answers. *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 39, 111 P.3d 1192 (2005) ("'produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers'") (citations omitted).

While the AGO contends it met its CR 30(b)(6) obligation because its designee, Shirley Battan, "was the most knowledgeable person about the general process," Respondent's Br., at p. 34, the record clearly reflects the inadequacy of the AGO's response. The very first subject on which Justice Sanders requested discovery from the AGO's CR 30(b)(6) witness was "[t]he <u>grounds</u> for each exemption claimed...." CP 501 (emphasis added). Justice Sanders further requested discovery into "[t]he existence

of, the nature of, and parties to any attorney-client relationship claimed" and "[t]he nature of any claimed case or controversy claimed as a basis for any exemption...." CP 501. Ms. Battan's testimony reflects the AGO's failure to comply with its CR 30(b)(6) obligations:

> Q. Exhibit 11, again, was withheld originally under the controversy exemption. Do you have any understanding as to why this particular document was claimed as exempt under Exemption J?
>
> A. Not personally, but, again, it may reflect the thought process of Narda Pierce and perhaps that's why it was withheld as part of work product.
>
> Q. But as you sit here today, you don't have -- you can't state definitively the basis of the state's claim.
>
> A. Correct.
>
> ...
>
> Q. ... Is it correct with respect to all of the exemptions claimed on Exhibit 2, [the EDI], that as a 30(b)(6) deposition deponent, you cannot state the exact basis of the exemption claimed; is that fair?
>
> A. I think I can state the exemption that was given at the time, but in terms of the particular rationale that was in the mind of the person who provided the document, that -- no, I cannot do that.
>
> Q. And so when you say you can state the exemption, meaning you can read what is on the privilege column?
>
> A. Right, correct.

CP 563-565.

The AGO had the opportunity and obligation to provide sworn testimony through its CR 30(b)(6) witness explaining the claimed exemptions it failed to explain in its logs. Instead, the AGO provided an unprepared CR 30(b)(6) witness, and then attempted to answer the questions designated in the CR 30(b)(6) deposition notice through unsworn "testimony" in Appendix A. The trial court should not have considered Appendix A as support for the AGO's claims.[10] This is particularly the case because Appendix A added substantive claims including the first invocation of the common interest doctrine and the addition of multiple claims of attorney-client privilege. CP 127-154.

In sum, whether Appendix A was labeled as an appendix or a "cover sheet" (as the AGO now calls it), the AGO should have been held to its prior claimed exemptions and deposition testimony; it should not have been allowed to reinvent its exemptions on summary judgment through the aid of unsworn statements unsupported by personal knowledge.[11]

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[10] This is particularly the case when, as here, many documents do not have enough factual detail to allow the court to independently determine what cases, clients, or controversies support the claimed exemptions. *See e.g.*, CP 1379-1380 (Doc. No. 7); CP 1382 (Doc. No. 11); CP 1383-1384 (Doc. No. 13); CP 1390-1391 (Doc. No. 28); CP 1427-1428 (Doc. No. 105).

[11] The cases cited by the AGO regarding the use of "cover sheets" for *in camera* review are simply inapposite in the PRA context. In both *Currie v. IRS*, 704 F.2d 523, 530 (11th Cir. 1983) and *Vaughn v. Rosen*, 383 F.

E. The Court's Decision to Award Penalties and Fees Should be Affirmed, But the Court Erred in Its Calculations of the Appropriate Amount.

1. The PRA's brief explanation requirement is a vital component of understanding withheld public records, the violation of which calls for waiver or a monetary penalty.

The plain language of the PRA required that the AGO's initial response to Justice Sanders "include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3) (emphasis added). The trial court correctly found that the AGO's response was "devoid of any explanation." CP 1718. Without a brief explanation, Justice Sanders had no understanding of why claimed exemptions applied. As discussed above, it was not until after four separate opportunities to provide a brief explanation had passed and the litigation was at cross-motions for summary judgment that the AGO decided to comply with this

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Supp. 1049 (D.D.C. 1974), the agencies proffered explanations to aid the court in its *in camera* review under the federal FOIA. The FOIA does not require that agencies provide explanations of claimed exemptions to requesters. *See Currie*, 704 F.2d at 529-30, 532 (affirming the denial of the requesters' motion for an order to compel the IRS to provide an index of withheld documents setting forth each claimed exemption and the factual basis for the claim). The PRA, in contrast, explicitly requires the agency provide the requester with a list of claimed exemptions and brief explanations of how the exemptions apply. RCW 42.56.210(3). While "cover sheets" may be useful to federal courts for *in camera* review, disclosure of their contents to requesters at the time of production is

requirement. For this conduct, the AGO argues that no waiver or penalty should apply. Respondent's Br., at pp. 33-34, 48-49. Instead, the AGO claims it is immune from fulfilling its obligations under the PRA until a court issues "an order requiring the agency to provide an adequate explanation." *Id.*, at p. 49.

The PRA "includes a penalty provision that is intended to 'discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.'" *Yousoufian v. Office of Ron Sims* ("*Yousoufian I*"), 152 Wn.2d 421, 429-30, 98 P.3d 463 (2005) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)). Adopting the AGO's position will allow any state agency to openly disregard the plain language of the PRA without consequence. An agency could provide no claim of exemption or explanation for how the exemption applies, and force the requester to resort to litigation to obtain this information.[12] This hardly comports with the AGO's duty to "provide for the fullest assistance to inquirers" and to

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mandatory under the PRA.

[12] The AGO argues that a court order is the proper remedy for a violation of RCW 42.56.210(3). This section of the PRA contains both the requirement to claim a specific exemption for each withheld record and the requirement to provide a brief explanation of how the exemption applies. RCW 42.56.210(3).

promptly respond to all requests.[13] RCW 42.56.100, .520. The trial court did not err when it assessed a penalty for the AGO's refusal to provide a brief explanation until summary judgment.

The AGO argues that penalties for violations of the PRA are not specifically provided for in the statute and therefore they are not appropriate. Courts may, however, award penalties for violations of the PRA other than wrongful withholding. *See e.g.*, *O'Neill v. City of Shoreline*, __ Wn. App. __, 187 P.3d 822, 832-33 (2008) (holding that wrongful deletion of e-mail metadata may result in penalties) (citing *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 298, 299 n.3, 825 P.2d 324 (1992) (awarding a monetary penalty for not disclosing a destroyed record)); *Kleven v. City of Des Moines*, 111 Wn. App. 284, 296-97, 44 P.3d 887 (2002) (stating in dicta that penalties would be appropriate for violation of record keeping requirements of PRA).

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[13] In support of its argument that the only remedy available for a violation of the brief explanation requirement is an order, the AGO cites a federal district court case from New York State interpreting the federal rules of civil procedure. Respondent's Br., at p. 49 (citing *In re In-Store Adver. Sec. Litig.*, 163 F.R.D. 452, 457 (S.D.N.Y. 1995). The AGO does not cite to any authority interpreting a provision of a public records statute for this proposition. The PRA's plain language and the policies behind the statute control in the instant case. Further, *In re In-Store Advertising Securities Litigation* supports Justice Sanders' position that waiver of exemptions is appropriate where a party repeatedly fails to explain claimed exemptions. *In re In-Store Adver. Sec. Litig.*, 163 F.R.D. at 457 (citing cases where flagrant failure to explain exemptions results in waiver).

The AGO misinterprets the trial court's ruling and Justice Sanders' argument as to why a violation of the brief explanation requirement is a separate penalty under the PRA. The trial court properly awarded penalties for (1) the AGO's wrongful withholding of non-exempt records and (2) the AGO's violation of the brief explanation requirement. CP 1846-1847. The AGO mistakenly asserts that *Citizens for Fair Share v. State*, 117 Wn. App. 411, 72 P.3d 206 (2003), stands for the proposition that these two violations of the PRA are treated as a single violation for the purposes of penalties. Respondent's Br., at p. 44. In *Citizens for Fair Share*, the court treated two provisions of the <u>same</u> section of the PRA as a single violation – the failure to cite an exemption and the failure to provide a brief explanation. These requirements are both part of RCW 42.56.210(3). *Citizens for Fair Share*, 117 Wn. App. at 431 (citing former RCW 42.17.310(4), currently codified as RCW 42.56.210(3)). In contrast, here the AGO violated two separate PRA sections: wrongful withholding under RCW 42.56.070 and lack of a brief explanation under RCW 42.56.210(3). A penalty should be assessed for each, distinct violation. The amount of penalties, whether viewed as a single penalty or separate penalties, should also reflect the fact that there were multiple violations.

2. PRA responses that create a moving target for the requester call for more than the minimum penalty.

The trial court erroneously awarded Justice Sanders the minimum penalty for its wrongful withholding of documents. The minimum statutory penalty of $5 per record, per day is reserved only for those "instances in which the agency has acted in good faith but, through an understandable misinterpretation of the [PRA] or failure to locate the records, has failed to respond adequately." *Yousoufian v. Office of Ron Sims* ("*Yousoufian II*"), 137 Wn. App. 69, 80, 151 P.3d 243 (2007) (quotations and citations omitted). The AGO makes no claim that it misinterpreted the PRA or failed to locate records.

Instead, the AGO claims that it should pay only the statutory minimum because "it relied on its lawyers' advice in determining what documents to produce, redact, or withhold." Respondent's Br., at pp. 42-43. Regardless of whether or not the AGO relied on its attorneys' advice, it is not entitled to the statutory minimum where it claimed different exemptions at different times, produced documents subsequent to the filing of this litigation, provided three inadequate exemption logs and an unprepared CR 30(b)(6) witness, and did not even approach compliance with the most basic requirements of the PRA.[14] These actions show a

[14] The AGO cites *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 747, 948

pattern of bad faith, which in turn impeded Justice Sanders' ability to understand why documents were withheld until after filing suit, conducting discovery and briefing cross-motions for summary judgment. This pattern of either gross negligence or wanton behavior calls for higher penalties. *Yousoufian II*, 137 Wn. App. at 80.

The AGO points to two alleged "indicia of good faith": (1) that the AGO hired an independent law firm once it was sued, and (2) that the AGO subsequently produced documents. Respondent's Br., at p. 42 (citing CP 1866-1867). The trial court further found evidence of good faith because the AGO made a timely initial disclosure of records. CP 1866. Under this logic, an agency acts in good faith where it produces some, but not all, of the records to which a requester is entitled and then, if

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P.2d 805 (1997), in support of its contention that it acted in good faith. However, the facts in *Lindberg* are far different than those in the present case. In *Lindberg*, the court held that a County acted in good faith where the County "reasonably believed" that the documents were exempt from production under the federal Copyright Act. *Id.* at 747. Here, the AGO does not argue that it erred in its interpretation of any law, much less a complex federal statute. Further, *Lindberg's* penalties and fees analysis is arguably no longer good law under *Yousoufian II*. The Court in *Lindberg* held that the District Court had the discretion to award $1,110 in total costs and penalties. *Id.* However, the requesters' costs were over $600, leaving a judgment for penalties of only $500. *Id.* at 746-47 & n. 45. The records were wrongfully withheld for 219 days. *Id.* at 747. The minimum penalty award under the PRA therefore should have been 219 days x $5/day, or $1095. *See Yousoufian I*, 152 Wn.2d at 433. Under current Supreme Court precedent the *Lindberg* penalties and fees analysis has been overruled because less than the statutory minimum was awarded.

the requester sues for wrongful withholding, the agency hires a lawyer and subsequently produces documents it should have produced in the first place. This is an untenable proposition and finds no support in the case law. Instead, *Spokane Research* and its progeny clearly reject this position. *See Spokane Research*, 155 Wn.2d at 103-04; *West v. Thurston County*, 144 Wn. App. 573, 581, 183 P.3d 346 (2008) ("Government agencies may not resist disclosure of public records until a suit is filed and then, by disclosing them voluntarily, avoid paying fees and penalties.").

The AGO attempts to shield its bad faith behind the Supreme Court's decision in *Progressive Animal Welfare Society v. University of Washington* ("*PAWS II*"), 125 Wn.2d 243, 253, 884 P.2d 592 (1994). But its interpretation of *PAWS II* is overbroad. Under the AGO's expansive reading of *PAWS II*, an agency could claim documents it does not want to release are exempt under any theory and then force the requester to bring suit before critically examining the documents to determine the best argument. While in some factual situations agencies should be given flexibility to meet the PRA's requirement of prompt responses, *see PAWS II*, 125 Wn.2d at 253, that is not the case here. In *PAWS II*, the Court did not hold a state university solely to exemptions initially claimed in a letter written by a layperson (the university president). *Id.* The present facts are a far cry from this situation. The AGO aggressively asserts that "[i]t is

undisputed here that the State relied on its lawyers' advice in determining what documents to produce, redact, or withhold." Respondent's Br., at pp. 42-43. The AGO's own CR 30(b)(6) witness admits that each record was individually reviewed by an attorney before a decision to withhold or disclose was made. CP 538-539. Indeed, Ms. Battan testified that each record was reviewed for claimed exemptions first by an attorney and then a second time, usually by a paralegal and, if there was any question as to the exemption, by a group of attorneys and staff in the AGO's office. CP 538-540. The initial exemptions claimed here were deliberately made by persons trained and skilled in the law and the public records process. Where such an extensive initial review takes place, subsequent shifting of exemptions is not justified.

Further, the reasoning behind *PAWS II* does not apply to this case. The Court allowed the university in *PAWS II* to change its exemptions because of the PRA's requirement for prompt responses. However, the AGO does not argue that it changed or added exemptions due to the pressure of generating a prompt response. Indeed, as described above, the process the AGO took to review documents for potential exemptions was quite detailed. CP 538-540. Additionally, the AGO's most substantive changes to its exemptions came when it filed Appendix A with its summary judgment motion. At that time, the AGO had already produced

three other exemption logs and a CR 30(b)(6) witness. The AGO had multiple opportunities to properly claim its exemptions and provide a brief explanation. Its failure to do so should result in higher penalties, if not waiver (as argued in Justice Sanders' Opening Brief).

3. Public entities that improperly withhold public records are penalized for every day the record is wrongfully withheld.

The AGO also asks this Court to absolve it from the payment of penalties for the time the trial court spent reviewing documents *in camera* and issuing its substantive rulings. There is no legal support for this request.

The PRA awards penalties for "<u>each day that [the requester] was denied the right to inspect or copy said public record.</u>" RCW 42.56.550(4). This is not a discretionary decision. *Yousoufian I*, 152 Wn.2d at 438-39 ("The determination of the number of days is a question of fact."). The plain language of the statute makes it clear that a penalty is incurred for every day beginning with the day denial of inspection was issued until the record is produced. Days spent by the trial court considering and ruling on the merits are part of the risk in withholding records, and are inherent in any legal action. Further, the plain language reading of the PRA is supported by the policy behind the penalty provisions, namely that penalties are assessed "to 'discourage improper

denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.'" *Id.* at 429-30 (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)). The trial court's decision to award penalties for each day the records were wrongfully withheld comports with the statute and case law, and should be affirmed.

4. The trial court improperly segregated fees and costs.

The AGO recognizes that Justice Sanders should receive any fees and costs "involved in successfully compelling disclosure of information." Respondent's Br., at p. 37 (quoting *Tacoma Pub. Library v. Woessner*, 90 Wn.App. 205, 951 P.2d 357, 972 P.2d 932, 932 (1998)) (emphasis added). The AGO then mistakenly argues that the trial correctly "segregated fees and costs by identifying and determining the relative 'weight' of each issue." Respondent's Br., at p. 38. The AGO cites no case law in support of this approach. Justice Sanders brought a complaint for wrongful withholding of records under the PRA. Justice Sanders prevailed on this "issue." CP 1860. Costs and fees are awarded based on the amount of work required to successfully compel disclosure. *See Woessner*, 972 P.2d at 932; Opening Br., at pp. 41-44. The actual amount of documents wrongfully withheld is irrelevant to the amount of fees and costs required

to force the AGO's compliance with the PRA.[15] Here, Justice Sanders was forced to bring litigation and incur all of his fees and costs in order to compel the AGO to produce non-exempt documents. The AGO does not suggest how Justice Sanders could have otherwise obtained the records that the trial court ordered disclosed. The nature of the AGO's violations, such as not providing Justice Sanders with a proper explanation of claimed exemptions under which he could appropriately challenge withheld records, required that Justice Sanders litigate documents based on the same core law and facts. Subsequently, the actual amount of documents ultimately ruled wrongfully withheld did not vary the total amount of fees and costs incurred. *See* Opening Br., at pp. 42-43. The trial court's decision to treat wrongful withholding as only one of four issues was an error of law and its segregation of Justice Sanders' fees should be reversed.

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[15] The AGO cites to *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 856, 60 P.3d 667 (2003), *aff'd in part, rev'd in part*, 152 Wn.2d 421, 98 P.3d 463 (2004), to assert that the trial court's award was "generous." Respondent's Br., at p. 38. However, the court in that case did not affirm a twenty-percent discount in fees based on either the "weight" of various issues or the number of documents disclosed, but on factors generally considered in the trial court's discretion, such as the fact that most of the fees were incurred after production of wrongfully withheld documents. *Yousoufian*, 114 Wn. App. at 856-57. Here, the AGO did not produce many wrongfully withheld records until after Justice Sanders had incurred all of his attorneys fees and costs and the court ordered production.

F. There is No Basis to Reverse the Trial Court's Award of Fees and Penalties.

The AGO briefly requests that the Court of Appeals reverse the award of attorney's fees and penalties below. Respondent's Br., at p. 39. But, as noted above, the AGO assigns no error to the trial court's findings that the AGO violated the PRA in multiple respects, nor does it assign error to the fee award itself. For these reasons, there is no basis to reverse the trial court's award, even in the event that the AGO prevailed on appeal. And because Justice Sanders should prevail in this appeal, he should also receive attorney's fees and expenses on appeal.

III. CONCLUSION

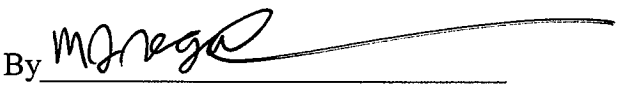
This Court should affirm the trial court's decisions to deny the AGO's motion for summary judgment, assess a penalty for the AGO's blatant violation of the brief explanation requirement and award Justice Sanders penalties for every day the public records were wrongfully withheld. This Court should reverse in part where the trial court incorrectly applied exemptions to the PRA, order the AGO to produce all non-exempt records and award Justice Sanders all of his fees and

expenses. The AGO's extensive and prolonged attempts to avoid disclosure of public records in this case mandate a strong penalty.

DATED this 22nd day of September, 2008.

Respectfully submitted,

K & L GATES ELLIS LLP

By 

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DIVISION II

Honorable Richard B. Sanders, Petitioner, v. State of Washington, Respondent.	No. 35920-1-II CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 22nd day of September, 2008, I caused true and correct copies of the Response and Reply Brief of Respondent to be delivered to the following:

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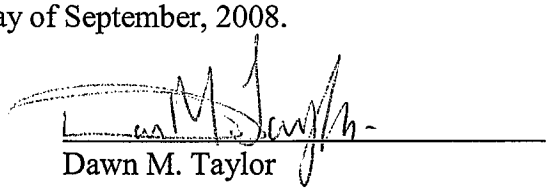

Dawn M. Taylor